

## Aberystwyth University

### *Protection of older people in Wales: A guide to the Law*

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Older People's Commissioner for Wales  
Comisiynydd Pobl Hŷn Cymru

# Protection of older people in Wales:

## A guide to the law





# Foreword

The abuse of vulnerable adults is an ugly truth and is not a new phenomenon. By working together, we in Wales are finding that a better understanding of adult protection issues is rightly leading to a more open and fuller debate about how these matters should be addressed. In recent years there has also been a much greater public awareness of these issues, which in turn has led to a much lower tolerance of adult abuse.

I am pleased that significant progress has been made in tackling elder abuse. Older persons should be able to live in dignity free of exploitation and physical or mental abuse. Anything else is quite simply a breach of their human rights. We must not, therefore, be complacent.

It is important that we continually strive to eradicate this blight from our communities. It also is essential that we keep pace with the ever changing context, such as our developing understanding of abuse and how to tackle it and the changing needs of people using social care services. A good example of this is the rise in the numbers of frailer older people receiving complex, and often multi-agency, packages of support.

Raising an individual's awareness of their rights is a key first step in them being able to enjoy them. One barrier to awareness can often be the complex nature of the legislation in this area. I therefore welcome this guide produced by the Older People's Commissioner for Wales, which seeks to simplify this difficult area of legislation to help practitioners in their work. It will also help individuals and those caring for them who wish to develop their understanding of these issues.

**Gwenda Thomas AM, Deputy Minister for Social Services**



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# Introduction

Since I took on the role of Older People's Commissioner for Wales in April 2008, I have spoken with many older people and with voluntary and statutory bodies across Wales. I have been made aware of the deep concerns held by many in relation to the abuse of older people.

I believe that the Older People's Commissioner has a particular role in advocating for the most vulnerable older people in our society. There are older people whose voices are seldom heard and these are often the people who need most protection. One of the functions of the Older People's Commissioner is to keep under review the adequacy and effectiveness of law affecting the interests of older people in Wales. I have said that there is a pressing need to review current legislation on adult protection. The law needs to be clear, accessible and in line with the need to promote equality and human rights. The law is part of a wider picture and not a solution in itself; it is, however, an important tool and we need to ensure that it is an effective one.

During conversations with those who work in the field of adult protection, it became clear that many people see the current law on adult protection as a confusing maze. This guide seeks to reduce that confusion; its purpose is to help make practitioners more aware of the law available to them in their day to day work. It is not a substitute for obtaining legal advice nor is it a definitive statement of the law. However, it is hoped that it will provide a helpful starting point. The guide focuses on older people but is also relevant to those working with any adult at risk of harm.

We owe a debt of gratitude to Professor John Williams of Aberystwyth University who drafted this guide. The guide demonstrates not only Professor Williams' legal expertise, but also his commitment to the human rights of older people.

It is my hope that there will be reform of adult protection law in Wales. We want to see a Wales in which respect for the rights and dignity of older people is a practical reality in all areas of life, where age discrimination is a thing of the past and where a positive view of ageing and of older people prevails.

**Ruth Marks, Older People's Commissioner for Wales**  
**April 2011**



# Chapter 1:

# Human Rights and Elder Abuse

## Introduction

Human rights are possessed by everybody – older age is not a ground for denying a person their human rights or restricting their enjoyment of them. There are many international agreements guaranteeing basic human rights to all people, without discrimination. The Universal Declaration on Human Rights, which is now sixty years of age, is one of the best-known agreements. The United Kingdom has signed and ratified the Convention. The United Nations Principles for Older Persons (see Appendix 2) identify Independence, Participation, Care, Self-fulfilment and Dignity as key principles. Although not legally enforceable, they are principles that underpin working with older people. Within Europe, there is the European Convention on Human Rights. Again, the United Kingdom is a party to the European Convention on Human Rights and in the Human Rights Act 1998 it belatedly made it part of our law, enforceable in local courts and tribunals within Wales.

Human rights impose duties on the State to ensure that it treats us appropriately, openly and fairly. They also require the State to make sure that we are protected from other people unjustly interfering with our rights. The protection of the criminal law is one way in which it can do this.

It is important not to over-simplify how human rights work in practice. Often there needs to be a careful balancing act. In elder abuse cases, it may be necessary to balance the duty to protect an older person with the duty to respect their right to decide for themselves. Do we intervene or not? If we do intervene, how should we do it? There may be occasions when it is necessary to interfere with a person's right in order to protect the rights of others, or to protect another one of their rights. Rights often appear to conflict with each other. The State may have a legitimate interest in interfering with an individual's human right if, for example, they have committed a criminal offence. It is important to be aware of how complex the 'human rights calculation' may be, particularly in the area of elder abuse.



Human rights are relevant to elder abuse in two different ways:

1. Abuse of a human right may constitute abuse – for example, unnecessary sedation or ‘do not resuscitate’ policies are a violation of a person’s human rights and amount to abuse.
2. Human rights require the State (public authorities such as social services and health bodies) to take necessary action to prevent abuse, wherever it happens, and to respond to it appropriately. Article 13 European Convention on Human Rights requires that there should be an effective remedy in cases of violation.

Human rights

- Belong to everybody – whatever their age
- Are based on fairness, equality, dignity and respect
- Mean that the State must not unlawfully interfere with our rights, for example by treating us in an inhuman or degrading way
- May require the State to act to protect our rights, for example to protect our life

## What does the law say?

Under the Human Rights Act 1998, ‘a public authority’ must not act in a way that is incompatible with any of the rights in the European Convention on Human Rights. Government departments, the police, local authorities and NHS hospitals are obvious examples of public authorities. A care home run by the independent sector is a ‘public authority’ if it provides accommodation together with nursing or personal care to a person under arrangements made with a local authority.

It has been emphasised by the courts that the European Convention on Human Rights imposes a positive duty on the public authority to prevent the violation of rights, rather than responding after there has been a violation. In the case of *A v UK* the European Court of Human Rights said that vulnerable individuals, in particular, are entitled to state protection in the form of effective deterrence against breaches of personal integrity. The other important point made in this case is that the state must protect our rights even though the abuse happens in private space such as the home or a private care home.



The European Convention on Human Rights contains a number of rights relevant to elder abuse. The main ones are:

Article 2: 'Everyone's right to life shall be protected by law.' This is sometimes mistakenly referred to as the 'right to life'. In circumstances when an older person's life is threatened by abuse or neglect, the state has a duty to provide appropriate protection. This may include the protection of the criminal law and/or intervention by a public authority under the safeguarding procedure.


Article 3: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' The important words here are 'inhuman or degrading treatment'. Abuse is inhuman and degrading and if it is severe enough will fall within this article.

Article 5: 'Everyone has the right to liberty and security of person.' This means that we cannot lock up vulnerable older people in their bedroom, a hospital ward or a care home. This would be abuse and unlawful, even when the person doing it thinks it is in their 'best interests'. The Article recognises that there may be circumstances where it is necessary to take away somebody's liberty. However, there must be a clear law that enables this to be done and provides safeguards for the older person. The Deprivation of Liberty Safeguards are an example of such a procedure.

Article 6: '...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' This right extends not only to criminal proceedings (for both defendants and witnesses), but also to any hearing the outcome of which will affect a person's life in a significant way.







Article 8: ‘Everyone has the right to respect for his private and family life, his home and his correspondence.’ This is a wide ranging right. Private life includes the right to decide for yourself, dignity and respect, the right to make what others may think are ‘unwise or eccentric decisions’, and the right to refuse medical treatment. Family life includes having the ability to maintain contact with your family without too many obstacles placed in your way. A person’s home is important and must be respected, similarly their correspondence, which includes phone calls.

Article 9: ‘Everyone has the right to freedom of thought, conscience and religion’.

Article 10: ‘Everyone has the right to freedom of expression.’

Article 14: ‘The enjoyment of the rights and freedoms [in the European Convention on Human Rights] shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth *or other status*.’ This includes discrimination on the grounds of age.

A final point to note about human rights law is what is known as ‘proportionality.’ This emphasises the need to achieve a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual’s human rights. If we are going to interfere with a person’s human rights (for example, the right to a private life) there must be a pressing social need for the interference. The fact that the person may be being abused may be such a pressing social need, but not always. An appropriate balance must be struck.

## When should I use it?

The simple answer to this question is that we use human rights law all of the time. Human rights should be the basis of good practice.

## How do I use it?

When using human rights law it is important to remember that there will be competing rights and interests. The human rights calculation requires you to ask the following:

1. What right(s) is/are potentially engaged? (remember, there may be more than one – for example, Article 3 and Article 8)
2. If more than one right is engaged and there is a conflict between them, which one prevails?
3. Are the human rights of another person affected? If so, what weight should be given to them – for example, the rights of another resident in a care home.
4. Does the right allow the state to 'interfere' with it?
5. Is the proposed interference proportional?

## What are its limitations?

One of the most frustrating aspects of human rights law is that very often it is reactive – the right has already been violated and the professional is seeking to put it right. Human rights awareness must be present at all stages (including policy development) of the provision of health and social care, and in investigating cases of suspected abuse.

## Points to remember

- Older age is not a reason for denying somebody respect for his or her human rights.
- Human rights do not necessarily require us to avoid risk.

## Examples

1. A care home has a policy of locking its doors at all times. The reason it gives is that several of the residents are 'vulnerable' and cannot be allowed to visit the local town on their own. This is a violation of the rights to liberty and a private life. The only lawful way of doing this is through a deprivation of liberty authorisation or using the powers under the Mental Health Act 1983.
2. An older woman living in a residential care home had a fall and was admitted to hospital. While she was in hospital, the local authority decided that she needed full time nursing care and should therefore be moved to a nursing home rather than returning to the residential care home. She is not consulted. This is a violation of her right to respect for her private life, her home and probably her family life. These rights must be considered by the local authority.
3. An older person in a hospital is left to lie in soiled bed sheets for hours on end. He has extensive bedsores that are not treated. Calls for help are ignored. When he is washed, he is stripped in front of all the other patients. This is a violation of his right to dignity and could amount to inhuman or degrading treatment.
4. An older person is physically attacked by her carer and is eventually taken to hospital. There is a cursory investigation into the case and it is decided that no further action will be taken because 'she is over eighty and people over that age are always confused – in addition we don't want to put the poor love through the process. Let's just forget it and have a word with the carer.' This is a violation of the right to be protected from inhuman and degrading treatment and the right to an effective remedy. The attitude towards her is ageist and she is being discriminated against in the enjoyment of her rights on the grounds of her age. This is not to say that prosecution is appropriate in all cases of elder abuse, but it cannot be ruled out because of such ill thought out and ageist reasons.

## Other information

Text of the European Convention on Human Rights  
<http://www.hri.org/docs/ECHR50.html>

Guardian – Human Rights  
<http://www.guardian.co.uk/law/human-rights>

Equality and Human Rights Commission  
<http://www.equalityhumanrights.com>

Liberty  
<http://www.liberty-human-rights.org.uk/index.php>





# Chapter 2: Capacity

## Introduction

Capacity is something we take for granted. When we go shopping, make a will, enter into a mortgage agreement or refuse medical treatment, we take it for granted that our capacity to do so will not be challenged. Deciding for ourselves is a key part of our right to autonomy – and that includes decisions that others may regard as misguided, bad or perverse. It includes the right to say ‘yes’ and, very importantly, the right to say ‘no’. However, for some people capacity to decide is less clear. A person’s capacity to decide may be lacking or failing as a result of, for example, dementia or an acquired brain injury. Capacity may be lost on a temporary basis, for example, when somebody is unconscious or suffering the consequences of medication. Or it may be a long term or permanent loss. Another variable factor is that a person may have capacity to do some things (for example, to consent to or refuse a dental check up) but lack capacity to do other things (consent to or refuse to undergo major surgery).

To conclude that somebody lacks capacity has far-reaching implications as it means that the person is unable to make the decision. In these circumstances, it would be absurd to deny the person medical treatment because doctors do not have the legal authority to act. For this reason the courts devised the ‘doctrine of necessity’ under which decisions affecting the life of an adult without capacity are legally valid if they are in their ‘best interests.’ Best interests risks heavy paternalism. Practitioners may feel that doing what *they* consider appropriate is always going to be in the person’s best interests. This may ignore that person’s previously expressed wishes or go against their religious or personal beliefs.

Assessments of a person’s capacity and deciding what may be in the ‘best interests’ of somebody without capacity raise many concerns over their human rights. How certain are we that the person lacks capacity? What can we do to maximise their chance of making the decision for themselves? What factors should be taken into consideration in deciding whether a proposed course of action is in their best interests? What safeguards are there against abuse or misuse of the responsibility to make these decisions?

# What does the law say?

## General rules on consent and refusal

Before considering capacity, it is worth noting the legal requirements for a valid consent or a valid refusal. This may be relevant in deciding whether abuse has taken place (was the person coerced into signing the property transfer?) and in obtaining their consent to do certain things as part of the safeguarding process. The law requires the following:

1. Information
2. Capacity
3. Made of the person's own free will

### Information

Sometimes it is difficult to calculate how much information should be provided. To a large extent it is a matter of professional judgement. Obviously, it is not possible to give a person every imaginable piece of information that may be relevant. However, they are entitled to know of the more important matters affecting any decision. For example, as part of a safeguarding investigation, moving the person to a care home may be considered. It is important that the person is aware of the potential financial implications in order for them to make a decision. In the case of financial abuse, it is important to know whether the person had the necessary information to decide whether a transfer of their home would affect their legal right to live there. There is an obligation on practitioners to ensure that people have the necessary information. Very importantly, there is an obligation to answer any questions that the person may ask - even if you think that knowing the answer is not what is best for them.

### Capacity

The person must have capacity and this is considered in more detail below.



## Free will


Finally, the person must make the decision of his or her own free will. A signature on a document is normally conclusive evidence that the person consented. However, a signature obtained because of threats of violence is clearly not valid consent. The law recognises that 'undue influence' will nullify consent or a refusal. One judge, Lord Donaldson, described undue influence as follows:

'... the doctors have to consider whether the decision is really that of the patient. It is wholly acceptable that the patient should have been persuaded by others of the merits of such a decision and have decided accordingly. It matters not how strong the persuasion was, so long as it did not overbear the independence of the patient's decision. The real question in each such case is 'Does the patient really mean what he says or is he merely saying it for a quiet life, to satisfy someone else or because the advice and persuasion to which he has been subjected is such that he can no longer think and decide for himself?'

In other words, is it a decision expressed in form only, not in reality?

In safeguarding cases, the presence of undue influence is an essential consideration as it is highly likely that the alleged abuser will exercise considerable control and authority. It may also arise in a closed environment such as the person's home where the controlling behaviour is hidden. So, what constitutes undue influence?

- A suspected abuser may place an older person at risk by persuading them to follow a certain course of action.
- A suspected abuser may place an older person at risk by persuading them to refuse a certain course of action. The question is whether the relationship of confidence and trust that the older person has with that person inhibits the older person's ability to decide.
- The undue influence could stem from someone other than the alleged abuser who wants to cover up what the alleged abuser is doing – for example, another family member or another professional.



The point at which lawful persuasion tips over into undue influence is a matter of judgment, but the following factors may be relevant.


- Is the person allegedly exercising undue influence in a position of trust – care home staff, domiciliary carer, or relative?
- In cases of financial abuse in particular, has the person been offered independent advice?
- In cases of transfer of property, has the person been offered independent advice?
- Have you as a professional had the ability to talk to the person alone?
- Does the decision put the person at significant risk (for example, loss of their home or significant sum of money)?
- Is the particular act untypical and out of character, based on what you know or have been told about the person by somebody close to them?

None of these is on its own conclusive. They are merely indicative and suggest that further investigation is necessary. It is important to remember that people have the right to make decisions that might not make sense to us. They may also work out for themselves that they do not like what is happening (for example, £5 taken from their purse or wallet every week), but they are prepared to accept that because it means that they can continue to live in their own home.

## The Mental Capacity Act 2005

The Mental Capacity Act 2005 updated the law to meet the concerns about the way in which the common law was working. The Mental Capacity Act 2005 sets out a list of statutory (that is, legally enforceable) principles that apply to decision making under the Act. The principles are:

1. A presumption of capacity - every adult has the right to make his or her own decisions and must be assumed to have capacity to do so, unless it is proved otherwise

- 
2. The right for individuals to be supported to make their own decisions - people must be given all practicable help before anyone concludes that they cannot make their own decisions
  3. The individual retains the right to make what might be seen as eccentric or unwise decisions
  4. 'Best interests' – anything done for or on behalf of people without capacity must be in their best interests
  5. Least restrictive intervention – anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedom of action

Decision makers must ensure that these principles are followed and be able to demonstrate through good record-keeping that this is the case. The Principles are largely self explanatory, however a few particular points should be emphasised.

- Principle 1 – the presumption of capacity: this is the starting point of all assessments of capacity. The assessed person does not have to prove that they have capacity; it must be proved that they do not. Unfortunately, there are occasions where this does not happen and a presumption is made (perhaps on the basis of age, disability or appearance) that the person must lack capacity and it is up to them to prove the contrary. The Mental Capacity Act 2005 is very clear that a lack of capacity cannot be established merely by reference to a person's age, appearance, or any condition or aspect of their behaviour, which might lead to unjustified assumptions about capacity.
- Principle 2 – supporting people to make their own decisions: wherever possible a person must be helped to make the decision. It is always important to provide information to people in a way and through a medium that they have the best chance of understanding. Any special communication needs must be met. Language must be appropriate as must be the setting and timing of the assessment. The person may require an advocate and one should be provided.

- Principle 3 – unwise or eccentric decisions: the fact that a person makes an ‘irrational decision’ is not an indicator of lack of capacity. We all have the right to make what others think of as foolish decisions. One judge summed this up by saying that the right to choose exists ‘...notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent.’
- Principle 4 – ‘best interests’: more on this below.
- Principle 5 – least restrictive intervention: this is an important principle. When a person has been assessed as lacking capacity, it does not follow that practitioners have a free hand to decide what is ‘best for them’. In deciding what to do (for example, whether to apply for a Deprivation of Liberty authorisation or to undertake a forensic examination) the proposed course of action must be restricted to what is absolutely necessary to achieve the desired result. So, for example, it may be agreed that a Deprivation of Liberty authorisation is in the best interests of the person. However, the length of that deprivation should be informed by the need to ensure that it is not disproportionate to the risk being addressed.

Even before the Mental Capacity Act 2005, the courts emphasised that the test for capacity was a functional test rather than one based on a person’s personal characteristics (for example age or disability) or whether their decision is a ‘sensible’ or ‘rational’ one. This approach has been adopted in the Mental Capacity Act 2005. Under section 2 Mental Capacity Act 2005 a person lacks capacity ‘... in relation to a matter if at the material time he/she is unable to make a decision for him/herself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.’

Three points should be noted:

- The test is subject sensitive – it refers to the assessment being ‘in relation to a matter’. A person may have capacity to do some things at the same time as lacking capacity in others. Blanket labels of ‘incapacity’ should normally be avoided; rarely will a person completely lack capacity.


- The test is time sensitive – it refers to the ‘material time’, that is, the time at which the decision has to be made. An assessment that a person lacks capacity at a particular moment does not mean that they will lack capacity forever more. The assessment must be reviewed to ensure that if the person has regained capacity at some later date they will be able to decide for themselves. The Mental Capacity Act 2005 specifically mentions that the ‘impairment or disturbance’ may be permanent or temporary. If it is likely that the person may regain capacity in the future, and the decision can wait until then, then the decision should be deferred until that time.



- The test refers to being ‘unable to decide’ because of ‘an impairment of or disturbance in the functioning of the mind or brain’. There is a link between the two - the fact that somebody cannot make a decision does not mean that they lack capacity unless it is linked to the impairment or disturbance. Similarly, the fact that the person has an impairment, does not mean that they lack capacity if they are capable of making a decision.

The Mental Capacity Act 2005 refers to being ‘unable to decide’. What does this mean? This is explained in section 3 Mental Capacity Act 2005. This section confirms that the functional test is still the legal test. A person is unable to make a decision if they are unable to do all three of the following:

1. to understand the information relevant to the decision,
2. to retain that information,
3. to use or weigh that information as part of the process of making the decision.



A key part of this is the right of the person to have information to enable them to make a decision. As noted above, Principle 2 requires us to maximise the chances of the person deciding. Information must be given, but given in an appropriate format, setting and time. The Mental Capacity Act 2005 refers to the potential use of ‘simple language, visual aids and any other means’.

How long is it necessary to retain the information? The simple answer is ‘as long as is necessary’ to use or weigh the information as part of the decision making process.


However, for those with fluctuating or rapidly declining capacity there may only be a relatively short period of time within which the decision can be made by the person. Somebody in this situation may not have the luxury of spending a long time deciding, however they must be provided with every opportunity to make the decision even though the time available may not be ideal.

As noted above, the ‘quality’ or ‘rationality’ of the decision is irrelevant in deciding on their capacity.

There is an alternative ground upon which a person may be ‘unable to decide’. This is where the person is unable to communicate his/her decision. This is a residual category and will rarely be used. It is not intended to relieve practitioners of the obligation to use all possible aids to communication (for example, signing). The category is designed to cover people who probably have capacity under the test just outlined, but are physically incapable of communicating their wishes even with the use of aids. An example of such a case would be somebody with locked-in syndrome.

If it is decided that a person lacks capacity in relation to a particular matter at a particular time, then a decision must be made on the basis of what is in their ‘best interests’. It is very difficult to say what is in anybody’s best interest. To be able to make such a judgement it is important to know as much about the person as possible and to try to discover the things that might have influenced their decision if they had capacity. There is, of course, the inevitable risk that the decision maker will impose their own value judgements on the person – they may use the argument that ‘if this was me, I would want ...’. That is not the correct approach.





As with the decision on whether a person has capacity, the Mental Capacity Act 2005 warns against making best interest decisions based on a person's age or appearance, or on a condition or aspect of his or her behaviour, which might lead others to make unjustified assumptions about what might be in his or her best interests. Consideration must also be given to whether the person may at some time in the future regain capacity in respect of the matter to be decided and, if so, when that is likely to be. It is also incumbent upon the decision maker to permit and encourage the person to participate in the process as fully as possible; this may include enhancing their ability to participate.

The Mental Capacity Act 2005 requires the decision maker to take into consideration (as far as is 'reasonably ascertainable'):

1. the person's past and present wishes and feelings (in particular, any written statement made during capacity),
2. the beliefs and values that would be likely to influence his/her decision if he/she had capacity, and
3. the other factors that he/she would be likely to consider if he/she were able to do so.

Written statements are considered below. Past wishes may be gleaned from personal knowledge, talking to friends and carers, what other professional say and previous courses of conduct. As is seen under (1), regard must also be had to the present wishes and feelings of the person. Thus, the loss of capacity does not mean that the person's view should not be sought and taken into consideration where it is reasonably ascertainable.

Under the Mental Capacity Act 2005, when deciding what would be in a person's best interests account must be taken of the views of

- anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
- anyone engaged in caring for the person or interested in their welfare,

- any donee of a lasting power of attorney granted by the person, and
- any deputy appointed for the person by the court.

This only applies where it is practicable and appropriate to consult them – for example, in an emergency it may not be practicable to consult. Similarly, it may not be appropriate to consult one of the above if they are suspected of abusing the person who lacks capacity, or they are estranged. It is important to note that the consultation is undertaken to elicit what is in the best interests of the person lacking capacity and not what the person being consulted wants to happen.


Under common law, it is not possible for proxy consent to be given by a relative or carer of a person who lacks capacity. Getting the ‘consent’ of a spouse or partner, or of a son or daughter or parent of an adult child, does not have any legal effect. However, under the Mental Capacity Act 2005 there are a number of ways in which such proxy decision making can be formalised:

1. Lasting Power of Attorney (LPA): this is a legal procedure whereby a person with capacity appoints others to look after their affairs in the event of a loss of capacity. It is essential that the person has capacity when making the LPA – if they do not, making one ‘on their behalf’ will most probably be a form of abuse. A decision lawfully taken by somebody appointed under an LPA is legally valid if it falls within the terms of the LPA. The LPA power will be exercisable as such, if the person loses capacity.

A LPA may be made that covers:

- a. the person’s personal welfare in general, or a specific aspect of it (e.g. where the person wishes to live), and/or
- b. the person’s property and affairs in general, or a specific aspect of them (e.g. sale of the person’s home).


Special provisions apply to the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment - the LPA must contain express provision about such situations.



Where an LPA exists, it is important for practitioners to check that the person who claims to be the attorney has been appointed as such, and that the specific power they wish to exercise is one that is covered by the LPA (e.g. when making the LPA the person may only have included property and affairs – thus, the attorney will not be empowered to decide matters of personal welfare). The claim ‘I am attorney under an LPA therefore I can decide this matter’ is one that should be checked. Of course, in an emergency where immediate action is required that may not be a possibility – but this should still be checked afterwards if at all possible.

Practitioners may also encounter Enduring Powers of Attorney. These have been made under previous law and are still valid, although an important difference is that, they only apply to property and financial affairs and not to welfare.

2. An Advance Decision (AD): These are sometimes known as ‘living wills’ or ‘advance directives’. An AD allows a person to specify during capacity that, in the event of them losing capacity, they do not wish a specified treatment to be carried out or continued. Again, the AD does not come into play unless the person loses capacity. An AD may be withdrawn or altered at any time during capacity. If the AD includes life sustaining treatment, special provisions apply including the need for the person to clearly state that such treatment is covered.
3. The Court of Protection supervises the working of the Mental Capacity Act 2005. As part of its role, the Court may appoint a Deputy to make decisions in relation to a person who lacks capacity. The Deputy may be a family member, friend, Director of Social Services, a professional (e.g. solicitor or accountant) or another appropriate person. When acting within the specific powers given by the Court, a Deputy can make a lawful decision. In addition to appointing a Deputy, the Court of Protection may also make a decision on behalf of the person who lacks capacity (e.g. whether to have medical treatment, or whether to dispose of assets). Normally, the Court will make a specific order where there is a single issue to be decided, and appoint a Deputy when there is an ongoing responsibility to make decisions.



If a professional has any concern about the way in which any of these decision making processes are working, they should report their concerns. It is regrettable that in some instances the processes designed to protect people who lack capacity are misused or abused and end up harming the person. The Office of the Public Guardian has a supervisory role over LPAs and the work of deputies.

## When should I use it?

Capacity is relevant in two ways under the safeguarding policies and procedures. First, the lack of capacity may be the basis of abuse – for example, when an abuser financially exploits a person lacking capacity or there is a lack of consent to sexual activity. Also, it is a criminal offence for a person to ill treat or wilfully neglect somebody who lacks capacity, or who the person reasonably believes lacks capacity. Second, capacity is important in deciding how the safeguarding policies and procedures operate. A person with capacity has considerable control over how far an investigation goes. They can refuse to co-operate, and this may make the process more difficult. In addition, the range of options available if the person lacks capacity is greater under the Mental Capacity Act 2005, including making decisions in the best interests of the person and the possibility of a Deprivation of Liberty authorisation.

## How do I use it?

Deciding whether somebody has capacity or whether a particular course of action is in his or her best interests is very complex. Professional judgment is important and you need to be sure that your decision is one that would command the respect of a group of your peers. Wherever possible (and especially in relation to very important decisions) you should discuss your opinions with other practitioners.

## What are its limitations?

- The Mental Capacity Act 2005 does not give a power to intervene in the lives of people who have capacity, but who may be particularly frail and vulnerable. The authorisation to act under the 'best interests' test only exists where the person lacks capacity at the material time and in relation to the material matter.
- The 'best interests' test does not mean that we should always do what the practitioners think is desirable. Other factors, such as previously expressed wishes or the views of carers may lead to another conclusion.

## Points to remember


- The five principles – they are legal principles and not just good ideas and therefore must be adhered to as a matter of law.
- Any judgements made under the Mental Capacity Act 2005 must be ones that would gain the support of a responsible body of your peers.
- All decisions must be compatible with the person's human rights.
- Do not make assumptions about peoples' capacity on the basis of age, manner of dress, way of life, or anything other than the test in the Mental Capacity Act 2005.
- Assessments of capacity should be reviewed.

## Case studies for consideration

(Suggested responses to case studies can be found in Appendix 1)

The use of the Mental Capacity Act 2005 and case studies for consideration

1. Ming is 85 years of age and she lives alone at home in the former family home, which she owns outright. Last year she had a fall, fractured her collarbone, and was severely bruised. She was hospitalised for about two weeks, the early part of which involved heavy sedation to control the pain.




Just after the accident her son, whom she had not seen for ten years, arrived at hospital to see her. He brought with him a completed Lasting Power of Attorney form appointing him as attorney with control over her financial and welfare matters. Ming was asked to sign this form from her hospital bed. Her son reassured her that it was all in her best interests and that it was the only way in which he could ‘look after her properly’ – if she did not sign, he did not see how he could ‘take care of her and avoid being accused of spending her money’. She was very confused at the time, but signed the form.

Since she returned home, her condition has deteriorated and her doctor considers her to be in the middle stage of developing Alzheimer’s. A number of significant withdrawals have been made from her savings account. Her son also thinks that she would be better off in a nursing home than living at home.

2. Gwyn is 65 years of age. He has had very little formal education as his family took him out of school at an early age to work in the slate mines. He has minimal reading skills, although can read basic material if given sufficient time. He is also moderately deaf and steadfastly refuses to wear a hearing aid. He was recently admitted to hospital and it was decided that he required surgery for lung cancer. Gwyn was given a hospital leaflet describing the procedure and the address of a website providing support for patients. The surgeon with responsibility for him also gave a technical explanation of the procedure and the likely prognosis. She was surprised that Gwyn was not actively involved in the discussion and questioned whether he had capacity to make the decision. A colleague saw Gwyn and asked him a series of questions including ‘who is the Prime Minister?’, ‘what day of the week is it?’, and ‘what is the price of a gallon of petrol?’. Gwyn did not respond to any of these questions. Both doctors formed the opinion that Gwyn did not have capacity and that it would be acceptable to perform the surgery in his ‘best interests’.
3. Catrin and Aled have been married for over fifty years. They live in a semi-derelict converted barn with no near neighbours. All their married lives they have devoted themselves to the care of semi-feral farm cats and currently have about twenty wandering around the house. They do not let them out for fear that they will not come back. The sanitary provision is rudimentary.






They are behind on their electricity bills, so are very frugal in the way they use heat and light. Aled has fallen several times and Catrin, who is a heavy smoker, is asthmatic. Their social worker has raised the possibility of them moving to sheltered accommodation. They both refuse to contemplate the idea – they are determined that when they die, it will be at home. Following a review of their case, it has been concluded that they must lack capacity as the risk of continuing to live in their home is far too great.

4. Malakai lost capacity following a brain injury sustained in a road traffic accident. He is 70 years of age. Unfortunately, his left leg has become gangrenous. Removal of infected tissue and the administration of antibiotics have proved to be ineffective. Amputation has been proposed; failure to amputate will almost certainly lead to death. The doctors have to decide whether this would be in his best interests. Relatives tell the doctors that Malakai had in the past said that he wanted his body to be whole when he goes to the next life. The doctors are very anxious to save his life because he has recently become a grandfather and appears to enjoy the company of his grandson.

## Other useful information

- Mental Capacity Act Code of Practice (2007), Ministry of Justice – <http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/docs/mca-cp.pdf>
- Deprivation of Liberty safeguards (2008), Ministry of Justice – [http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_087309.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_087309.pdf)
- Office of the Public Guardian website <http://www.publicguardian.gov.uk/>
- For more information on safeguarding procedures in Wales see the Social Services Improvement Agency's website – <http://www.ssiacymru.org.uk/index.cfm?articleid=2&splashpage=false>




# Chapter 3:

## Deprivation of Liberty

### Introduction

Our liberty or freedom is something that we take for granted. Depriving somebody of their liberty should normally only happen following a conviction for a criminal offence and a sentence of imprisonment. However, there are other circumstances when a person may lawfully be deprived of their liberty, for example, under the Mental Health Act 1983 people can be detained for assessment or for treatment if they meet the criteria laid down in the Act.

Following a case originally known as the ‘Bournewood case’ and subsequently (when it went to the European Court of Human Rights) as *HL v UK*, depriving people who lacked capacity of their liberty in a care home or hospital became a matter of national concern. Article 5 European Convention on Human Rights provides that nobody shall be deprived of their liberty ‘save in the following cases and in accordance with a procedure prescribed by law’ – one of the cases listed in the Article is that the person is ‘of unsound mind’. In the Bournewood case (which pre-dated the coming into force of the Mental Capacity Act 2005) the European Court of Human Rights felt that the old common law test of acting in the best interests of a person without capacity was too arbitrary and lacked sufficient safeguards (especially when compared with the safeguards under the Mental Health Act 1983) and therefore violated Article 5. There followed a period of consultation and eventually new sections were inserted into the Mental Capacity Act 2005 which introduced what are known as the ‘Deprivation of Liberty Safeguards’ (DOLS). Although they are not primarily aimed at the safeguarding procedure, they may be relevant in some cases where the older person lacks capacity. Depriving people of their liberty without an authorisation under DOLS will be abuse, unless some other lawful authorisation exists.



It is difficult to say precisely what a deprivation of liberty is; it is different from restraint, which may under certain circumstances be lawful. It has been said that the distinction between a deprivation and a restriction/restraint of liberty is one of fact and will depend upon a range of factors. Locked doors without the possibility of leaving, inappropriate sedation, and even the culture of the home or hospital (nobody dares ask to go out) may be sufficient. The European Court of Human Rights said of the situation in the Bournewood case:

‘the key factor... is that the healthcare practitioners treating and managing [the patient] exercised complete and effective control over his care and movements’ and he ‘was under continuous supervision and control and was not free to leave’.

## What does the law say?

The DOLS outline the procedure under which authorisation may be given to deprive a person of their liberty, either in a care home or in a hospital; DOLS cannot authorise a deprivation of liberty in the person’s own home. Any authorisation to deprive somebody of their liberty in their own home would have to come from the Court of Protection. Only rarely would such authorisation be granted.

Under DOLS an authorisation can only be granted if:

1. The person has a ‘mental disorder’ under the Mental Health Act 1983;
2. They lack the capacity to consent to the arrangements proposed for their care;
3. It is in their own ‘best interests’ that they are deprived of their liberty; and
4. It is not possible to care for them in a less restrictive way.

The DOLS process is complicated and involves a number of participants:

- The *relevant person* – the person being deprived of their liberty (or it may be that it is proposed to deprive the person of their liberty in the near future)




- The *Managing Authority* – this is the hospital or care home where the relevant person is, or where it is intended that they be taken. They have responsibility for making an application for a deprivation of liberty authorisation to the Supervisory Body.
- The *Supervisory Body* - this is the local authority in the case of deprivation of liberty in a care home and the relevant Local Health Board in the case of a hospital. They receive the application from the Managing Authority and based on the assessments they grant or refuse the authorisation.
- The *Independent Mental Capacity Advocate (IMCA)* - The IMCA service is available for an adult who has no one able to support and represent them, and who lacks capacity to make a decision about either:
  - a long-term care move
  - serious medical treatment

- adult protection procedures (in adult protection cases the requirement that there is nobody else to support and represent them does not apply).
- a care review.

Under the Mental Capacity Act 2005, the Supervisory Body must arrange a number of assessments.

1. Age assessment: Is the person aged 18 year or over?
2. The mental capacity assessment: does the person lack the capacity to consent to the arrangements made for their care? (the Mental Capacity Act 2005 test applies – see Chapter 2).
3. Mental health assessment: is the person suffering from a mental disorder under the Mental Health Act 1983?
4. Best interest assessment: three issues have to be decided.
  - a. Is the person being deprived, or about to be deprived, of their liberty?
  - b. If so, is it:
    - i. in the person's best interests; and
    - ii. necessary to prevent harm to self?
  - c. Is the actual or proposed deprivation of liberty a proportionate response to the likelihood of the harm and the seriousness of that harm?
5. No refusals assessment: to establish whether an authorisation would conflict with other existing authority for decision making for that person (e.g. under a LPA or under the Court of Protection's jurisdiction).
6. Eligibility assessment: to establish whether the relevant person should be covered by the MHA 1983 or a DOL under Mental Capacity Act 2005.



All of these assessments must support the need for a DOLS authorisation. **If one of the assessments is negative, then a deprivation of liberty cannot be authorised.**

The above procedure is the ‘standard procedure’. Conditions may be attached to a standard authorisation including recommendations on contact, the person’s culture or other major issues related to the deprivation of liberty, which if left would mean that the deprivation of liberty would cease to be in the person’s best interests.

A standard authorisation should last for the shortest period possible. If the circumstances that precipitated the DOLS are resolved, the authorisation should end. It is also incumbent on the care home and hospital to make every effort to no longer deprive the person of their liberty; this can be achieved by, for example, organising outside visits, maximising the person’s ability to move around within the setting, encouraging visitors and enabling the person to access fresh air.

There is also provision for urgent authorisation. If the person needs to be deprived of their liberty as a matter of urgency, the Managing Authority can give itself an urgent authorisation for up to 7 days and this provides interim authorisation while the standard authorisation application is made. An urgent authorisation cannot be made unless an application is made for a standard one at the same time. An urgent authorisation will only last for up to seven days. In very exceptional circumstances, the Supervisory Body may extend it.

## When should I use it?

DOLS should only be used in exceptional cases – a least restrictive form of intervention should always be considered. It may be necessary to use DOLS to remove a person from an abusive environment, or to prevent their return to one from a care home or hospital. It will be necessary to work closely with the Managing Authority providing them with necessary information to enable them to make the decision whether to seek an authorisation.





## How do I use it?

It is important, as always, to balance a number of different human rights – home, family, private life and protection from inhuman or degrading treatment. DOLS should not be routinely used, in the absence of other legislation, as a means of depriving people of their liberty in order to protect them from abuse.

## What are its limitations?

- DOLS only applies where the person lacks capacity and meets the other requirements of the Mental Capacity Act 2005 – it is not a general procedure available in all cases of older people at risk of abuse.
- DOLS cannot be considered as a permanent solution to a particular case of abuse. An authorisation can only last for a limited period – as short as is possible in the circumstances.
- DOLS does not authorise medical treatment.
- DOLS does not apply to people who may be deprived of their liberty in their own home.

## Points to remember

- All the assessments must agree that a DOLS authorisation is appropriate.
- Other legally empowered decision makers may exist – they should be able to make the decision.
- The deprivation must be in the best interests of the person.
- Deprivation of liberty can take many forms.
- In genuine emergencies, it may be possible to restrain temporarily a person to protect them from serious harm; any restraint must be proportional. Ongoing restraint will probably amount to a deprivation.

## Case studies for consideration

(Suggested responses to case studies can be found in Appendix 1)

1. Dewi lives in a nursing home. He has severe Alzheimer's and does not have capacity to make decisions other than the most basic ones. At times, he gets very agitated and can become violent towards his carers in the home. He is also prone to wandering around the home. In consultation with his son, the home has decided that it is in his best interests to be confined to his room. A numeric keypad lock has been installed. He spends most of the day and all of the night in his room. Good care is taken of him and he is clean and is helped to eat and drink. However, his daughter is now challenging these arrangements arguing that it is a form of abuse as he is being deprived unlawfully of his liberty. The home responds by saying that he does not know that his movement is being restricted and that it is part of their duty of care to keep him, and also members of staff and other residents, safe.
2. Abigail lacks capacity. She lives in a care home where she has her own room. During the day she is allowed to wander around the home, although recently she has been barred from the day room because she disrupts the other residents. Two or three times a year Abigail is taken in the minibus with other residents to the local park. However, she is not allowed to get off the bus for fear that she might wander off. The home has a garden and occasionally one of the staff will take her for a short walk through the garden. Abigail's sister would like to visit her, but has been advised by the home that she should only visit at particular times of the year (Easter and Christmas) as Abigail gets very anxious following her visits. The sister now claims that this is an unlawful deprivation of Abigail's liberty. The home argues that it is merely a restriction.



## Other Useful Information

Making decisions The Independent Mental Capacity Advocate (IMCA) Service  
[http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_073931.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_073931.pdf)

Deprivation of Liberty Safeguards Code of Practice  
[http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_087309.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_087309.pdf)

Age UK Factsheet No 62 – Deprivation of Liberty Safeguards  
<http://www.suffolk.gov.uk/NR/rdonlyres/5B060D27-6F4F-4CB3-91EE-D18A68681D43/0/FS62DeprivationofLibertySafeguards2.pdf>



# Chapter 4: Confidentiality and data protection

## Introduction

One area of considerable confusion in safeguarding work is the way in which practitioners handle often highly sensitive information about people. Working with adults who are at risk of - or experiencing - abuse or neglect, practitioners will be told many things by the person, friends, carers, families and other practitioners. How are they to handle this information? A number of myths have developed surrounding confidentiality and data protection, not least the idea that information can never be shared for fear of breaching confidentiality and data protection laws. The expectation under the safeguarding procedure is that information must be shared. The lesson from child abuse inquiries is that failure on the part of practitioners to share information often leads to tragic consequences.

Although 'confidentiality' and 'data protection' are often used interchangeably, they are two different things. 'Confidentiality' is where there is a duty of confidence, e.g. between a social worker or a lawyer and their client. The expectation is that information will not be shared with another unless there is legal justification for doing so. 'Data protection', as the name suggests, is about the way in which personal information held about individuals is protected when it is being 'processed' (e.g. collection, holding, organising, consulting, disclosure, and destruction) so that it is used fairly and lawfully.

It is important to remember that information given to you as a professional is not provided on a personal basis. As a professional (and an employee) you receive information in that capacity. It is not your own personal confidence with the provider of the information.



## What does the law say?

### Confidentiality

Some relationships have attached to them a legal duty of confidentiality. Doctor and patient is the most often cited example, but the duty extends to other groups including social care workers, nurses, lawyers, priests and volunteers. It is relatively easy to identify when a confidential relationship exists, namely where there is an expectation on the part of the provider that information will be treated confidentially. Practitioners have a duty of confidentiality towards their clients. This duty is often embedded in professional codes of practice. The reason for the duty is that people would be unwilling to talk to practitioners (often about very personal and private matters) unless they are reassured that what is said will be treated confidentially. It is safe to assume that information provided or obtained by professional health, law enforcement or social care workers as part of the safeguarding process is subject to the duty. However, the existence of a duty of confidentiality is only one part of the process.

Even if the information is given as part of a confidential relationship and is worthy of being respected as confidential information, the law does not require the professional to always keep it to themselves. What the law does expect is that confidential information about a person will not be shared socially or publicly with people who do not have a professional need to know. However, this does not mean that the information cannot, or indeed should not, be shared with others as part of the safeguarding process. Just as there is a public duty to keep information confidential, there is a competing public interest to share information, when necessary, to protect an individual.

What information is entitled to be protected by the duty of confidentiality? It is difficult to be precise as the law on confidentiality is not found in an Act of Parliament; instead it is a law that has been developed by the judges. One judge said that the information must have ‘the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge.’ It is wise to err on the side of caution and treat all information about the individual as confidential.




For example, the fact that you have been to visit a client deserves protection by the duty even though you do not intend to disclose the purpose or the result of the visit. A common sense test is helpful – or the ‘reasonable man’ test as lawyers describe it! Would a ‘reasonable man in the shoes of the recipient of the information ... have realised that upon reasonable grounds the information was being given ... in confidence.’ The ‘reasonable man’, or more appropriately the ‘reasonable person’ is one who exercises average care, skill, in their judgment; his or her opinions are used in law to decide on liability. One judge referred to him or her as the person ‘on the Clapham omnibus’!

So when might it be necessary to share confidential information with third parties?

1. An Act of Parliament may require it. The Children Act 1989, Prevention of Terrorism Act 2005, Road Traffic Act 1998 and the Criminal Procedure and Investigations Act 1996 are examples of legislation placing a legal obligation on people to disclose confidential information in certain circumstances.



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2. Section 115 of the Crime and Disorder Act 1998 states that ‘relevant authorities’ may disclose information where it is ‘necessary or expedient’ for the purposes of any provision in the Act. The purposes of the Act include preventing crime and disorder. Included in the list of ‘relevant authorities’ are the police, local authorities, probation services, and local health boards.
  3. The provider of the information may give consent for the information to be shared.
  4. There may be an overriding public interest in disclosing the confidential information to others. This overriding public interest may involve, for example, saving a vulnerable adult from death or serious injury.

The confidential nature of the information given under the safeguarding procedure does not mean that it goes no further than the professional to whom it was given. One thing that practitioners cannot do is to guarantee to a vulnerable adult that what they say ‘will go no further’. The information will have to be properly recorded and kept on file. Concerns about safeguarding issues must be reported. Very importantly, the information will be shared within the team including practitioners from other agencies.

It is unacceptable to withhold information on safeguarding on the basis that it is the ‘property’ of your own agency and must not be shared with others. The purpose behind sharing information is that those working under the safeguarding procedures obtain a broadly based and multidisciplinary assessment of the person’s situation. It is also important because an apparently insignificant piece of information may, when put alongside similar information from other practitioners, disclose an extremely serious situation. It is unacceptable that one professional keeps the information to themselves on the basis that it was given in confidence. Obviously, the interdisciplinary team must keep the information confidential and cannot share it with others unless one of the legal exceptions noted above apply.

## Data protection


Rather like health and safety legislation, a number of urban myths have grown up around data protection. Data protection law (to be found in the Data Protection Act 1998) controls the way in which we 'process' data and also allows individuals access to their personal records. It does not mean that information cannot be shared.

What does it mean to 'process' data? The definition given in the 1998 Act is self explanatory – 'processing' of 'information or data', includes 'obtaining, recording or holding it or carrying out any operation or set of operations on it, including its –

- (a) organisation, adaptation or alteration,
- (b) retrieval, consultation or use,
- (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
- (d) alignment, combination, blocking, erasure or destruction.'

This is a wide definition and covers all of what you are likely do with the data or information under any safeguarding procedure. Note also that the above definition is not comprehensive – it 'includes' the above.


The meaning of 'data' is wide – importantly, it is not confined to data held electronically, but includes handwritten notes and records. Under the 1998 Act, data is 'personal data' if a living person can be identified from the data, or from the data plus other information that may be held or likely to be held. 'Sensitive personal data' is information on racial or ethnic origin, political opinions, religious beliefs or other beliefs of a similar nature, trade union membership, physical or mental health or condition, sexual life, any offence committed or alleged, any criminal proceedings and their outcome. Additional protection is provided for sensitive personal data.



In what way does the 1998 Act control the use of data and information? The Act balances the need for you and your organisation to gather data with the right of the individual (known rather impersonally at the 'data subject') to be treated with respect and for appropriate regard to be paid to their privacy. The 1998 Act contains eight principles ('the Data Protection Principles'). They embody common sense and following them will go a considerable way towards meeting the requirements of the Act. The Data Protection Principles state,

1. Personal data must be processed fairly and lawfully.
2. Personal data must be obtained only for one or more specified and lawful purposes, and must not be processed in a way that is incompatible with that purpose or those purposes.
3. Personal data must be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
4. Personal data must be accurate and, where necessary, kept up to date.
5. Personal data processed for any purpose or purposes must not be kept for longer than is necessary for that purpose or those purposes.
6. Personal data must be processed in accordance with the rights of data subjects under the Data Protection Act.
7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
8. Personal data must not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

The Data Protection Act also allows the 'data subject' to ask for a copy of all the information that is held on them by a person or organisation – this is known as the 'subject access right'. This includes electronic records and some paper records. In some circumstances it may be possible to withhold information. The main exceptions are:

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- Information that identifies other people, unless they consent to disclosure (practitioners do not normally fall within this exception, unless identifying them would put them at risk);
  - If disclosure would prejudice the carrying out of social work because serious harm to the physical or mental health of the data subject or any other person would be likely as a result of the disclosure;
  - If disclosure would hinder the prevention and detection of crime or the arrest or prosecution of offenders.

Where the 'data subject' lacks capacity to make the application, an application may be made by anybody legally able to act on their behalf (for example, under a Lasting Power of Attorney or a deputy of the Court of Protection). Obviously, the request by such a person must fall within the scope of the powers that they have been granted under the LPA.

## When should I use it?

All of the time. Respecting confidentiality and protecting data is crucial.

## How do I use it?

Information gathered as part of the safeguarding process must be handled sensitively and with due regard to the rights of the provider. However, this must not be used as a reason for not sharing with other practitioners.

## What are its limitations?

There are no limitations as such as both confidentiality and data protection impose clear legal obligations, albeit these require practitioners to exercise professional judgement.


## Points to remember

- Never give an undertaking of absolute confidence – there is an obligation and expectation that information will be shared with other practitioners and this may include the police.
- Always make the person aware that you cannot keep information to yourself before they have the chance to tell you their account of what has happened – they can then make the decision whether or not to disclose.
- Effective investigation of cases of suspected abuse or neglect depend upon the full exchange of information between the relevant practitioners.
- Information you receive must not be shared outside of the professional environment.
- Deal with all information that you receive in accordance with the data protection principles.

## Case studies for consideration

(Suggested responses to case studies can be found in Appendix 1)

1. Jac is a social worker working in the local authority's older persons' team. Recently one of his clients, Gwenda, asked him whether she could tell him a secret. He agreed and said that what was said to him remained 'between the two of us'. She then told him that a neighbour was stealing small amounts of money from her. However, Gwenda was keen that nothing should be done, because she enjoyed the neighbour's company and would be devastated if she no longer called. Jac decides that he will keep this to himself, as it is part of a confidential relationship.
2. As part of an investigation into a case of suspected elder abuse, access to the medical records of an older person is sought. The doctor refuses to hand over the records saying they are confidential health records, although she is prepared to provide an edited version of the records which will exclude information that she thinks that the police and social services do not need to know because it is sensitive and probably has little if anything to do with the investigation.

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3. The local authority records on safeguarding investigations are stored on a shared drive. The computers linked to this shared drive are not password protected. One of them is an open access computer to which visitors to the building are able to use. It is highly unlikely that members of the public will stumble across the records by accident, but it is a possibility.
  4. Records are maintained of the investigation of a suspected case of elder abuse. The reports by social workers, police and health are included in these records. The minutes of any meetings about the case are also included. Although there is evidence of inappropriate behaviour, it is concluded that this was not intended or malicious and that the person against whom the allegations were made (for whom the wrong address is recorded) should just be made aware of the impact of his behaviour. Although he is made aware of the consequences of his behaviour, the records do not record the finding that his behaviour was not intended or malicious.

## Other useful information

Information Commissioner's Office

[http://www.ico.gov.uk/what\\_we\\_cover/data\\_protection.aspx](http://www.ico.gov.uk/what_we_cover/data_protection.aspx).

BASW Code of Ethics for Social Workers

<http://www.basw.co.uk/about/code-of-ethics/>

MINDInfo

[http://www.mind.org.uk/help/rights\\_and\\_legislation/confidentiality\\_and\\_data\\_protection](http://www.mind.org.uk/help/rights_and_legislation/confidentiality_and_data_protection)





# Chapter 5:

## The Criminal Justice System

### Introduction

This section considers the role of the police and the criminal justice system in the investigation of suspected cases of abuse or neglect. It also highlights some of the criminal offences that may have taken place. An interesting finding of the review of the English adult protection guidance, No Secrets, was that there were very few successful prosecutions in relation to safeguarding. Although it is important to recognise that criminal prosecutions are not always going to be the most appropriate outcome, this does not mean that the police role is unnecessary or that prosecutions are never appropriate. The section also reviews how the decision to prosecute is made and what provision is made for vulnerable witnesses in the courtroom.

### What does the law say?

#### The Criminal Law

Many instances of abuse will also amount to a criminal offence. The fact that the abuse took place between people who know each other and possibly in private space does not deprive it of its criminal character. An assault in a person's home can be as much a criminal offence as it would be if it took place in the street. It is important to emphasise the criminal nature of many forms of abuse or neglect. Doing so raises the prospect of the perpetrator being prosecuted. It also sends out the correct message to society that abuse is unacceptable.

There is a wide range of offences that may arise out of cases of abuse. They include the following:

## Offences against the person

- Causing or allowing the death of a vulnerable person – Domestic Violence, Crime and Victims Act 2004
- Improper administration of medicine – s.67 Medicines Act 1968
- Murder
- Assault
- Grievous bodily harm
- Actual bodily harm



## Sexual offences

- Rape
- Offences under the Sexual Offences Act 2003. These include sexual activity with a person with a mental disorder impeding choice, engaging in sexual activity in the presence of a person with a mental disorder impeding choice, and inducement, threat or deception to procure sexual activity with a person with a mental disorder impeding choice.

## Property offences and financial abuse

- Theft
- Fraud
- Criminal damage

The organisation Solicitors for the Elderly advise that you should look out for the following as indicators of financial abuse:

- an unexpected change to a will;
- the sudden sale or transfer of the home;


- unusual activity in a bank account;
- the sudden inclusion of additional names on an older person's bank account;
- the signature on a cheque or other document does not resemble the older person's usual signature;
- reluctance or anxiety on the part of the older person when discussing their financial affairs;
- the giving of a substantial gift to a carer or other third party;
- the sudden interest of a relative or other third party in the welfare of the older person;
- bills remaining unpaid, particularly where someone else is responsible for ensuring their payment;
- complaints that items of personal property are missing, such as jewellery, antiques and/or other items of potential value;
- a decline in the personal appearance of the elderly person that may indicate that their dietary, clothing and/or other basic personal requirements are being ignored;
- the deliberate isolation of an older person from their friends and family resulting in the carer having total control.

None of these is conclusive, but they may raise concerns.

## Mental health and mental capacity

Under s.127 Mental Health Act 1983 it is an offence for a person employed by a hospital or care home to ill treat or wilfully neglect a patient receiving treatment for a mental disorder as an in-patient or as an outpatient within the hospital or home.

It is also an offence to ill-treat or wilfully neglect a mentally disordered person subject to guardianship under the Act. The guardian may commit this offence or any other person having custody or care of the patient – there need not be a legal obligation to care.



Under s.44 Mental Capacity Act 2005 it is an offence to ill-treat or wilfully neglect a person who lacks capacity, or whom the perpetrator reasonably believes to lack capacity. The offence may be committed by somebody who has the care of the person, the donee of a Lasting Power of Attorney, or a deputy appointed by the Court of Protection.

## Harassment and putting people in fear of violence

The Protection from Harassment Act 1997 says that a person commits the offence of 'harassment' if

- he or she engages in a course of conduct (that is on at least two occasions) amounting to harassment, and
- he or she knows, or ought to know, that it amounts to harassment.


'Conduct' includes verbal and non-verbal conduct. 'Harassment' includes alarming the person or causing them distress. It must be unacceptable and oppressive conduct.

The Act also makes it an offence for a person, again through a course of conduct,

- to make another person fear, on at least two occasions, that violence will be used against them, where
- he or she knows, or ought to know, that this will cause the other person to fear violence on each of those occasions.

The court has the power to impose a restraining order on a person convicted of either of these offences. The order is designed to protect the victim from further conduct that amounts to harassment or causes fear of violence.

There is some scope for preventative work using these provisions. If the person is warned that their behaviour either causes fear or amounts to harassment, it will place them on a warning. It will be difficult for them to argue that they did not know the consequences of their actions. It may lead to them modifying their behaviour.




In deciding whether they ‘ought to have known’, the test is whether a ‘reasonable person’ having the same information would think that the conduct amounts to harassment or causes fear.

As well as criminal prosecution, the Protection from Harassment Act provides a civil remedy whereby a county court or the High Court can grant an injunction that restrains a person from further harassing another (see Chapter 7).

## The decision to prosecute

The use of the criminal law is not a panacea and on its own will not eradicate abuse. However, criminal law has a role to play. This may involve social care workers collecting evidence that may later be used in criminal proceedings. At some stage, they may be required to cross the line from therapeutic to forensic work. The Welsh adult protection guidance, *In Safe Hands*, reminds us that when complaints of alleged abuse suggest that a criminal offence has been committed, reference should be made to the police as a matter of urgency – ‘criminal investigation by the police takes priority over all lines of enquiry’ (para 7.8). Early involvement of the police will enable them to identify whether an offence may have been committed. *In Safe Hands* identifies a number of key issues arising out of police involvement:

- The quality of the evidence needs to be higher than for civil proceedings or other forms of intervention – in criminal cases, the test is ‘beyond all reasonable doubt’.
- Police involvement will help ensure that forensic evidence is not lost or contaminated.
- The police have considerable skills in investigating and interviewing. This will minimise the risk of unnecessary interviews and, probably more important, the risk of making an interview inadmissible in court because it breaches rules of evidence.
- Police investigations should proceed alongside those dealing with health and social care issues.



Detailed guidance is available on interviewing and obtaining evidence – see Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses and Using Special Measures. At all times social care and health practitioners should be aware of the possible conflicts that arise between their therapeutic and forensic roles.

The decision to prosecute is taken by the Crown Prosecution Service (CPS) following an investigation by the police. The CPS will review the evidence. It is important that the CPS be regarded as one of the agencies involved in the safeguarding process. There has been criticism that there is a reluctance to prosecute suspected cases of elder abuse, partly for reasons of misplaced concern over the welfare of older people. Again, it must be emphasised that prosecution is not appropriate in all cases and a difficult judgment has to be made. However, victims of elder abuse are entitled to the protection of the criminal law – indeed, it might be argued that their need for protection is greater.

When reviewing the evidence and deciding whether to prosecute, the CPS adopt a two stage test, known as the Full Code Test.

### **Stage 1:**

The evidential test: is the evidence sufficient to provide a ‘realistic prospect of conviction’? It is important that the expectations of the person and any relatives are not raised unless there is a realistic chance that there will be a conviction. This test raises a number of issues. The admissibility and reliability of the evidence is assessed. Will the witness ‘stand up at trial’? Although this is difficult to assess, it may be particularly difficult in the case of a vulnerable adult. However, the assumption that all older people will not ‘stand up at trial’ because of perceived frailty, poor memory, borderline capacity or simply older age must be challenged. Any unjustified assumptions about the ability of the individual to present evidence must be challenged. Many older people will make good witnesses – they may not enjoy the process (witnesses rarely do) and it may cause them stress. However, that is not a reason for denying them access to the criminal justice system.



## Stage 2:

Is the prosecution needed in the public interest? Do the public interest factors against prosecution outweigh those in favour? Under the CPS Code for Crown Prosecutors some guidance is given.

Prosecution is more likely if:

- The defendant was in a position of trust
- The victim was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance
- There are grounds for believing that the offence is likely to be continued or repeated (e.g. a history of recurring conduct)
- The offence was motivated by any form of discrimination against the victim's ethnic or national origin, gender, disability, age, religion or belief, political views, sexual orientation or gender identity; or the suspect demonstrated hostility towards the victim based on any of those characteristics
- A prosecution would have a significant positive impact on maintaining community confidence

Prosecution is less likely if it is likely to have a bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence.

The CPS has recently published prosecution guidance and prosecution policy on crimes against older people. The Policy document recognises the importance of prosecutions for elder abuse.

'Stopping crimes against older people and bringing perpetrators to justice must...be a priority for our society and for the CPS. The CPS recognises its role in protecting older people's human rights by prosecuting offenders effectively.' (para .10).



The Guidance document states:


‘Whatever the age of a victim or witness, their needs and case management issues should be assessed on an individual basis. Reliance should not be placed on pre-conceived or stereotypical notions and norms about older people in general.’ (para 7)

## The criminal justice system

Once a decision to prosecute has been taken, thought has to be given to how best the older person can be supported through the process. Those practitioners who have been involved in the investigation (collection of evidence, interviewing the older person or providing witness statements) must be careful not to compromise the case by being accused of coaching the witness. Support can be given by voluntary groups such as Victim Support. Practical problems must be resolved, such as how is the older person to get to the court and is the court easily accessible? In addition, the older person will probably never have given evidence before and will need to have information on what is going to happen.

For most people, giving evidence in court is difficult and stressful. In recognition of the fact that some people may be especially vulnerable when giving evidence, ‘special measures’ were introduced to enable people to give evidence more easily. However, the defendant also has a right to a fair hearing and this must be respected when any assistance is given to witnesses. It is a question of balancing the rights of the witness with the rights of the defendant.

For some time, special measures had been in place to assist children in child abuse cases to give evidence at criminal proceedings. The Youth Justice and Criminal Evidence Act 1999 extended these to adults. Special measures are available to eligible adults when presenting evidence at criminal trials where their vulnerability may affect the quality of their evidence. The special measures are not available to all adults. Very importantly, they are not available to a defendant.



Before the court grants permission to use them, the witness has to fall within the criteria in the Act. An older person may be eligible for special measures in the following circumstances:

1. *Vulnerable witnesses*: Where the court decides that the quality of the evidence is likely to be diminished because:
  - a. the person has a mental disorder within the Mental Health Act 1983, or has some other significant impairment of intelligence and social functioning; or
  - b. the person has a physical disability or suffering from a physical disorder.

OR

2. *Intimidated witnesses*: Where the court concludes that the quality of the evidence is likely to be diminished by reason of fear or distress – a number of factors are relevant, including:
  - a. The nature of the alleged circumstances surrounding the alleged offence
  - b. The age of the witness
  - c. Social and cultural background of the witness
  - d. Any behaviour towards the witness by the accused, a member of the defendant's family, or any person likely to be an accused or witness.

The CPS Guidance on Special Measures states that 'complainants in sexual assault cases are intimidated witnesses. Victims of domestic violence, racially motivated crime and repeat victimisation, the families of homicide victims, witnesses who self-neglect/self-harm or who are elderly and frail are also intimidated witnesses'.

Social care and health care practitioners may have to provide evidence based on their professional knowledge of the person to support an application for special measures.

Special measures consist of:

- Screening witness from accused
- Video-recorded evidence-in-chief
- Evidence by live link

- Evidence given in private
- Removal of wigs and gowns
- Allowing the witness to use communication aids
- Video-recorded pre-trial cross-examination and re-examination (not yet in force)
- Intermediaries – an approved intermediary to help a witness communicate with legal representatives and the court.

The judge must give the jury such warning as is necessary to ensure that the use of the special measures by the witness does not prejudice the accused. The use of some of these measures may make a prosecution more likely.

## When should I use it?

Although it is not always appropriate or realistic to use the criminal law, it is important to remember that abuse very often constitutes a criminal offence. The nature of the conduct does not change because it involves an older person at risk. An abuser should be made aware that their conduct may well constitute a criminal offence.

## How do I use it?

The decision to use the criminal law is a complex one and will involve a number of different agencies including the police and the Crown Prosecution Service. Close interagency working and the sharing of information is essential.

## What are the limitations?

- The criminal law is not a panacea.
- It depends upon getting the forensic side of safeguarding right. There is a great risk in the older person co-operating with a prosecution only for the case to fail because of an error in the investigative process.
- In some cases, using the criminal law may make matters worse.

## Points to remember

- Not all older people should be considered especially vulnerable within the criminal justice system. Many will cope with it as well as any other witness or alleged victim.
- Stereotypical views of older people must be challenged – it is the individual that matters.
- Within the criminal justice system, there are a number of competing interests. The interests of victims and witnesses are very important. However, we must not lose sight of the importance of being fair to the accused. They are entitled under the European Convention on Human Rights to a fair hearing.
- Involvement of the police is important. They have special powers and expertise that may be invaluable. The fact that the police are involved does not mean that they will take over the investigation in every case – it may be considered better in some cases if they are in the background and called upon when necessary. However, if a prosecution is a possibility then the police investigation may have to take priority.
- Working with the CPS is important. They have difficult decisions to make. The revised CPS guidance and policy documents are a significant development and agencies should use these as a basis for greater interaction with the CPS.

## Case studies for consideration

(Suggested responses to case studies can be found in Appendix 1)

1. Dafydd is in his eighties. He lives in a care home. Although the standard of care is good, Dafydd has noticed that some of his personal possessions are going missing. Last week a new pair of slippers disappeared from his room. When he raised the matter, he was told that the philosophy of the home is that everything is shared, and that includes personal possessions.

2. Dewi has just celebrated his 90th birthday. One of his gifts was an iPod player, something he had wanted for a long time. Dewi's informal carer, Martyn, asked to see the iPod and Dewi proudly presented it to him. Martyn told him that it was much better than his own was and he told Dewi that they would have to swap otherwise he (Dewi) might 'have an accident'. Reluctantly, Dewi hands over the iPod and receives an inferior version in return.
3. Jenny is 81 years of age, lives in her own home and inherited a substantial sum of money when her husband died. She has six children and eighteen grandchildren. Ten years ago, she made a will that left her property equally to her six children with some small bequests to her grandchildren. This will was made with independent legal advice. Two years ago, Jenny decided to share her house with a friend, Mari, who is in her early sixties. Initially this seemed to work well, although Jenny revoked the original will and made a new one four weeks after Mari moved in. However, recently Jenny's family have been concerned that Mari is preventing them from seeing or talking to Jenny. One of her daughters recently wanted to pay a cheque into Jenny's account to repay a small loan taken out five years ago; she noticed that the bank account was now in Jenny and Mari's name. Mari, who was declared bankrupt just before she moved in with Jenny, was recently seen proudly displaying her new 'top of the range' sports car.

## Useful information

CPS webpage on special measures

[http://www.cps.gov.uk/legal/s\\_to\\_u/special\\_measures/](http://www.cps.gov.uk/legal/s_to_u/special_measures/)

'Crimes against older people – prosecution policy' and 'Crimes against older people – prosecution guidance' - both available on the CPS website

<http://www.cps.gov.uk/publications/prosecution/index.html>

'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses and Using Special Measures'

[http://frontline.cjsonline.gov.uk/\\_includes/downloads/guidance/better-trials/Achieving\\_Best\\_Evidence\\_FINAL.pdf](http://frontline.cjsonline.gov.uk/_includes/downloads/guidance/better-trials/Achieving_Best_Evidence_FINAL.pdf)

Special Measures - Crown Prosecution Service Legal Guidance

[http://www.cps.gov.uk/legal/s\\_to\\_u/special\\_measures/](http://www.cps.gov.uk/legal/s_to_u/special_measures/)





# Chapter 6:

## Powers of entry and arrest

### Introduction

One of the most difficult aspects of investigating possible cases of abuse and neglect is the need to see the person - only then can informed judgements be made about their welfare and their point of view obtained. The law in Wales and England places great emphasis on property rights and to some extent still regards the home as the castle. If the suspected abuser is the owner or tenant of the home, they may obstruct entry. Even if the adult at risk is the owner or tenant, pressure may be put on them to refuse access to social services or health. Respect for property rights and the home is important and they are included in the rights protected under the European Convention on Human Rights. However, there are circumstances where there is an urgent need to obtain access to the person.

### What does the law say?

#### Obtaining access to the person


For social care workers and health care practitioners, entry into a home is restricted to when an invitation to enter is given by somebody who has the authority to do so (usually the occupier, owner or tenant of the property). If permission to enter is refused, difficulties arise and it may be impossible to get necessary evidence or to intervene to protect the person. Is the law of any help in this situation?

Under s.17(1)(e) Police and Criminal Evidence Act 1984 (PACE 1984) a police officer may enter and search premises for the purpose of saving life or limb or preventing serious damage to property. The power is not linked to a criminal offence and can be used at the discretion of the police officer without the need to obtain a warrant.

Other powers of entry exist for example under the Mental Health Act 1983.

- A magistrate may issue a warrant authorising a constable to enter premises (using force if necessary) where it is believed that a person thought to be suffering from a mental disorder has been or is being ill treated, neglected or not kept under 'proper control', or is living alone and unable to care for themselves. The warrant authorises the constable to remove the person to a 'place of safety' in order that they may be assessed under the Act or where arrangement for treatment or care may be made. The basis of this application will be information provided by an Approved Mental Health Professional (AMHP).
- An application to the magistrates court for a warrant to enter premises may also be made when a person is authorised under the Mental Health Act 1983 to take (or retake) a patient to any place and admission to the premises where the patient is has been refused, or a refusal is anticipated. A warrant authorises the constable to enter the premises, by force if necessary, and remove the patient.
- Section 115 of the Mental Health Act 1983 gives AMHPs the power to enter and inspect premises in which a mentally disordered patient is living if they have reasonable cause to believe that the patient is not under proper care. The power can only be exercised at 'reasonable times' and does not apply to hospital premises. The AMHP does not have any power to force an entry; however, a refusal may amount to an offence under s.129 of the Act, which covers obstructing authorised persons in the exercise of their powers. In these circumstances, a warrant under s.135 could be sought from the magistrates.





Powers of entry under sections 115 and 135 Mental Health Act 1983 are only available where a person has, or is thought to have, a mental disorder as defined by the Act. They are not generally available powers.

In the case of residential care, domiciliary care agencies, nurses agencies and independent hospitals, clinics and medical agencies, sections 31 and 32 Care Standards Act 2000 enable a person authorised by the 'registration authority' (Care and Social Services Inspectorate Wales – 'CSSIW') to enter and inspect. The person authorised may examine the management of the premises and the treatment of patients or persons accommodated or cared for there. It includes the power to interview in private any patient or person accommodated or cared for and who consents. Similar powers exist under s.48 National Health Service and Community Care Act 1990 in respect of premises other than those required to be registered under the 2000 Act, where community care services are provided.

Other powers exist which may be of assistance, although they are not specifically designed for adult protection cases. These include:

- s. 287 Public Health Act 1936: this gives local authorities the power to enter and cleanse premises that may constitute a public health risk. A warrant may be obtained from the magistrates' court in the case of refusal or anticipated refusal.
- s.47 National Assistance Act 1948: this applies to a person who is 'suffering from grave chronic disease or, being aged, infirm or physically incapacitated, is living in insanitary conditions; and is unable to devote to themselves, and is not receiving from other persons, proper care and attention'. A local authority may apply to a magistrates' court to remove such a person from their home if it is in their interests or necessary to prevent injury to the health of, or serious injury to, somebody else. An emergency procedure is also available. The archaic language demonstrates that the use of this legislation is no longer appropriate and the evidence is that it is never used.
- Public Health (Control of Disease) Act 1984: A number of provisions under this legislation enable the removal of people with infectious diseases.

## Arrest

Arrest may also be an appropriate form of intervention to protect a person at risk. Under s.24 PACE 1984, a police officer may arrest without a warrant anyone who is about to commit an offence; who is in the act of committing an offence; or whom he/she has reasonable grounds for suspecting to be about to commit an offence or to be in the act of committing an offence. However, this can only be done if one of a number of conditions exists. One of these conditions is 'to protect a child or other vulnerable person' from the person being arrested.

In limited circumstances described in s.24A PACE 1984, a person other than a police constable may arrest without a warrant anybody who is in the act of committing an indictable offence (in general terms, a serious offence that would usually be tried in the Crown Court) or whom they have reasonable grounds for suspecting is committing an indictable offence. Similarly, if an indictable offence has been committed, a person other than a constable may arrest anyone who is guilty of the offence or whom they have reasonable grounds for suspecting to be guilty of the offence. The power is exercisable if it is not reasonably practicable for a constable to make the arrest. It must be to prevent the person causing physical injury to self or another person, suffering personal injury or making off before a constable arrives. This power of "citizen's arrest" should be used only in the most extreme of circumstances and provided that the person exercising the power is assured of his or her own safety. Caution is necessary!

## When should I use it?

The above powers are very intrusive and consideration must be given as to whether they are proportionate or not. Where applications have to be made to the magistrates, the application must be backed up by evidence and legal advice is necessary. Some of the powers outlined above are not designed for cases of suspected abuse or neglect. Care must be taken not to fit people into a particular piece of legislation simply because it enables you to obtain access. For example, the public health legislation must not be misused. Similarly, the mental health provisions must only apply to those who genuinely fall or are thought to fall within its provisions.

## How do I use it?

With care. The basic rule in law is that there is no general power of entry for social care and health care practitioners. Police powers are extremely useful, but they depend upon a good working relationship with the police. At all times practitioners must have regard to their own personal safety and must never place themselves at unacceptable risk.

## What are its limitations?

- There may be difficulties in obtaining the initial evidence necessary to use one of the powers
- The autonomy of the person must be respected
- Force should never be used by social care and health care practitioners to detain somebody or to gain entry to premises
- Powers of entry and arrest are only short term – they provide only a limited opportunity for intervention.


## Points to remember

- Sharing of information will improve the evidence base and enable informed decision to be made about the use of these powers
- Where possible, informal methods of obtaining access should be attempted.

## Case studies for consideration

(Suggested responses to case studies can be found in Appendix 1)

1. Steffan, who is 75 years of age, lives with Simon who is his 'unofficial carer', although Steffan is quite mobile and is able to look after himself quite well. Social services have been concerned that Simon is physically abusing Steffan. Rope burns around his wrist have been observed



suggesting that Steffan has been tied up; Steffan is also losing weight and has become very reserved. Today Simon told the neighbour that he was going away for a couple of days and that Steffan would be on his own. Just before he left, the neighbour heard Steffan shout ‘no, no, no’. Simon was then seen leaving the house with his suitcase. The neighbour knocked on the door and there was no answer. She is very worried about Steffan. The social worker is concerned about Steffan’s safety and would like to obtain access to the house.

2. Pippa lives with her husband Wyn. They are both in their early sixties. In the past, Pippa has been a voluntary patient at the local hospital receiving treatment for her schizophrenia. It is suspected that Wyn neglects Pippa and on occasions throws her food away before she has had a chance to eat it. On the last visit to the home, the social worker noticed that Pippa was more than usually disorganised and delusional. She reports her concerns to the mental health team. An AMHP calls to see Pippa, but Wyn answers the door and tells him to ‘clear off – we don’t want you do-gooders round here’. The AMHP is very concerned about Pippa.
3. Jane, who is 78 years of age, lives alone in a small bungalow on a housing estate. Recently she has become very reclusive. She does not put out the rubbish bins for collection and leaves a lot of food waste on the front garden. Rats have been seen in the garden. Jane appears perfectly happy with this situation, although her neighbours are concerned about the condition of the house and are worried about her welfare and personal safety.

## Other useful information

CAB Adviceguide

[http://www.adviceguide.org.uk/index/your\\_rights/legal\\_system/police\\_powers.htm](http://www.adviceguide.org.uk/index/your_rights/legal_system/police_powers.htm)

LIBERTY: Your Rights

<http://www.yourrights.org.uk/yourrights/privacy/power-of-officials-to-enter-your-home/mental-health.html>



# Chapter 7: The use of private law

## Introduction


Much of the law discussed in this guide involves the state acting or having legal responsibilities. For these purposes, the 'state' includes local authorities, the police, NHS bodies and the Crown Prosecution Service. As individuals, we also have the ability to take out private actions against people if we think that they have wronged us. A private action may entitle us to receive damages for the injury caused, or to obtain some other form of remedy such as an injunction preventing the person from repeating their behaviour. This section considers some of the actions that may be available in elder abuse cases. Although these actions may help, they might be costly and much of the cost may fall on the older person.

## What does the law say?

Three types of private law actions are relevant. The first is the statutory framework applying to domestic violence, the second is the general law of Tort and the third is the Protection from Harassment Act 1997. (Private remedies for financial abuse are considered below.)

1. Domestic violence legislation: The Family Law Act 1996 provides two remedies for people experiencing domestic violence.
  - a. Non-molestation order: this order prohibits the abuser from molesting the person applying for the order, or any child. 'Molesting' has a wide interpretation and includes the use or threat of violence and serious pestering or harassment. There are many examples of such behaviour ranging from abusive letters or telephone calls to rifling through a person's personal belongings.

In deciding whether to make a non-molestation order, the court must consider all the circumstances surrounding the case. Particular regard must be had to the need to secure the health, safety and well-being of the person applying.



An application can be made for a non-molestation order as part of what are known as ‘family proceedings’ – these will include divorce and financial relief following divorce. It is also possible to make a freestanding application for a non-molestation order. An application may be made against a person with whom the applicant is ‘associated’. This is a much wider definition than spouse. It includes:

- i. Spouse or civil partner (includes former spouses or civil partners)
- ii. Cohabitants (including former cohabitants and same sex partners)
- iii. Someone living or who has lived in the same household (other than as an employee, tenant, lodger or boarder)
- iv. An immediate relative (e.g. sons or daughters and other close relatives – nephews or nieces, grandchildren, cousins)
- v. People who have agreed to marry one another
- vi. People who have or have had an ‘intimate relationship’ with each other, which was of ‘significant duration’

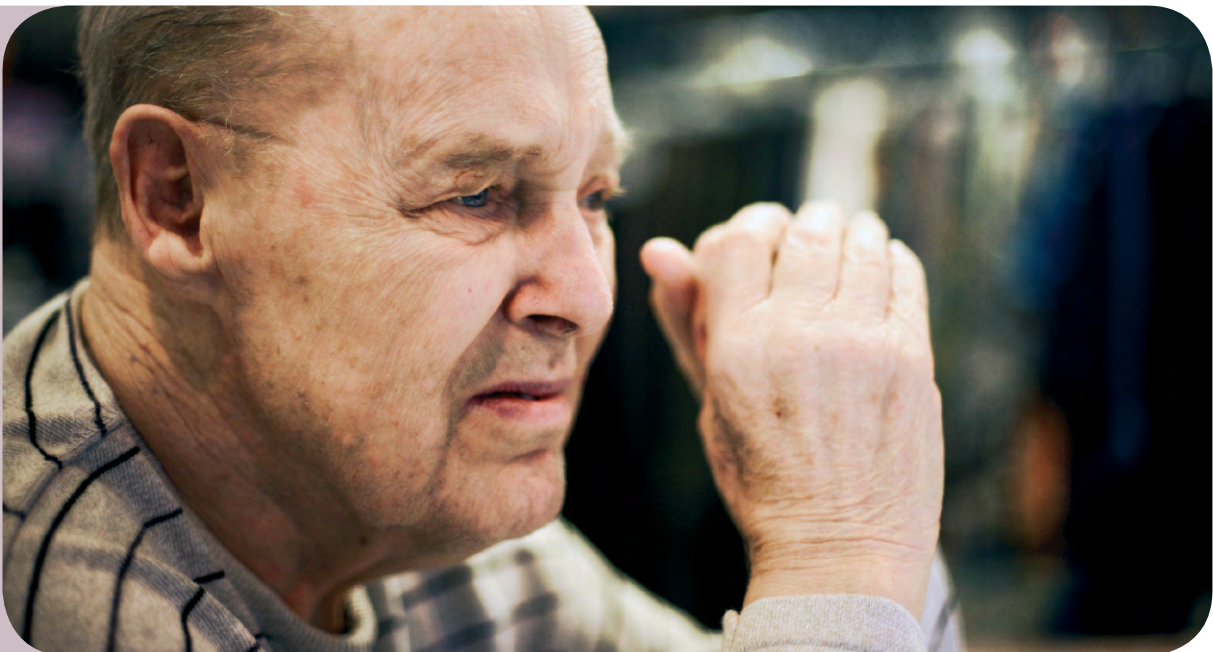
A breach of a non-molestation order is a criminal offence.


- b. Occupation order: this is a more serious order than non-molestation as it affects a person’s right to live in what they may consider their home. The provisions are complex and depend upon who has the right to occupy the home. It will also depend in part upon the relationship between the parties. It is advisable for the older person to obtain legal or other professional advice before applying. One possible consequence of such an order is that the other party is prohibited from entering the home, required to leave the home, or excluded from an area within or surrounding the home.

A breach of an occupation order is very serious. Where the person has used or threatened violence, the court making the occupation order must include a power of arrest unless adequate safeguards to protect the person applying (and others) are in place. This means that a police officer can arrest the person if they have reasonable cause to suspect that the person is in breach of the order. A breach of an occupation order is a criminal offence.

If a person takes legal action to protect their self or their family from domestic violence, they may qualify for legal aid without having to meet the normal financial conditions. The income of an abusive partner will not be taken into account when deciding whether they qualify for legal aid.

2. Actions in Tort: A tort is a wrongful act or omission that causes damage or injury. A private action can be brought against the wrongdoer, claiming damages or a court injunction preventing any repetition of the behaviour. Normally, torts arise out of negligent acts (see c. below). However, other torts may be apparent in cases of elder abuse. These are referred to as trespass to the person.
  - a. Assault and battery: these are two separate wrongs, although it is highly unusual for them not to be committed together. Assault involves putting a person in fear of an immediate battery. A battery is the use of physical force without any legal justification (e.g. not in self-defence). The force can be minimal, but it does not include accidental contact such as happens in a crowded room. For battery, there must be an intention to apply the physical force.
  - b. False imprisonment: False imprisonment means depriving a person of their freedom of movement without lawful excuse. It is not confined to detention by the police or by other state bodies; the tort can be committed by individuals or non-state bodies. A person may be falsely imprisoned in






his or her own home. For the tort to be committed, the person needs to be imprisoned. A common sense interpretation of imprisoned is required. It is not limited to keeping somebody locked in a cell. A person can be imprisoned through psychological pressure or the threat of force. Locked doors do not in themselves amount to imprisonment (we lock doors for reasons of safety). What is important is that the person is able to leave – it may mean that they have access to the key or to the numeric code that unlocks the door. It does not matter whether the person attempts to leave, or that they are aware that they are imprisoned. A person who lacks capacity may be falsely imprisoned.

If there is a lawful basis for the detention, it will not be false imprisonment. For example, a deprivation of liberty authorisation (see Chapter 3) provides a lawful basis for detention.

Unlike assault and battery, it is not always necessary to show that there was an intention to detain the person. It does not matter how long the person is imprisoned – it may be only for a relatively short period.

- c. Negligence: In the famous 1932 case of the snail in the ginger beer bottle (*Donoghue v Stevenson*) the judges recognised the existence of the tort of negligence. This tort is based on the idea that in certain situations we have a duty of care towards other people. This duty arises when we do everyday things – driving a car, walking down the street, riding a bicycle or skateboarding. It also arises in the performance of professional duties. A doctor must not be negligent in diagnosing or treating an illness and a care home must not be negligent in the way it cares for its residents. Negligence may amount to abuse. Three things are required to establish negligence:
  - i. A duty of care
  - ii. A breach of that duty
  - iii. Damage

There must be a relationship between the parties in which it is foreseeable that failure to take care will result in damage or injury. This gives rise to a duty of care. If there is a breach of the duty (a failure to take care) and damage or injury results from it, then an action in negligence may arise. The damage must have been caused by the failure to take care (what lawyers call ‘causation’) and it must not be too remote.

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3. Protection from Harassment Act 1997: It was seen in Chapter 5 that the 1997 Act created a criminal offence of harassment. The Act also provides that the victim of harassment can take a private action. This allows him or her to obtain damages for any anxiety or financial loss caused by the harassment, or an injunction restraining the person from continuing the harassment.

Private law remedies also exist to assist in the recovery of damages/ compensation for some types of financial abuse. These remedies are very complex and are likely to be expensive to use.


They include:

1. Damages for deceit: this allows for damages to be paid to compensate the victim for any loss they have incurred because of the deceitful action.
2. What is known as a 'proprietary claim' – that is, a claim against property. This allows the victim to claim ownership of the money that has been obtained by the abuser rather than simply a personal claim against the fraudster.
3. Tracing money: the victim may be able to trace the misappropriated property into the hands of any subsequent owner (for example, the person to whom the fraudster has transferred the property). In special cases this can include when the money is paid into a mixed fund (e.g. a joint bank account) rather than kept separate.

These are very complex areas of law and legal advice is strongly advisable. However, practitioners should be aware that they exist and that in some situations the consequences of financial abuse can be mitigated.

## When should I use it?

When to use the private law procedures outlined above is really a matter for the individual being abused. They will have to decide whether they wish to initiate the proceedings and they may have to make a contribution towards the cost of bringing the case. The domestic violence legislation provides two useful orders that may be backed up by criminal sanctions if they are breached.



They are not perfect, but they may make a difference. Damages arising from an action in Tort may provide appropriate redress for the wrong suffered. In some cases more is required if the abused person needs future protection. An injunction may be a way of providing that protection. Similarly, a breach of the Protection from Harassment Act 1997 may result in the payment of damages or an injunction.

## How do I use it?

Again, the way in which it is used is largely a matter for the abused person. However, practitioners can make people aware of these possibilities and direct them to appropriate sources of help.

## What are the limitations

- Sometimes injunctions are not successful and there may be practical difficulties in enforcing them.
- Damages do not necessarily prevent abuse; they simply attempt to compensate for past wrongs.
- The private law process may be expensive for the abused person.

## Points to remember

- Private actions are brought by individuals and not by a public authority on behalf of an individual.
- The standard of evidence required for private proceedings is on a balance of probability. This is a less demanding standard than beyond all reasonable doubt, which is the criminal law standard.
- Private wrongs (for example, battery) may also be criminal offences.



## Case studies for consideration

(Suggested responses to case studies can be found in Appendix 1)

1. Branwen, who is in her seventies, owns her own house. Recently her nephew, Glyn, moved in with her; he was homeless because he could not afford the mortgage on his home. Branwen allowed him to stay rent-free in the house out of her duty of love for a family member. Glyn is an aggressive man and often loses his temper. He shouts at Branwen and on occasions she fears for her own safety. Branwen suggested that Glyn moves out and finds a place of his own. He reacts angrily to this suggestion and starts to break Branwen's treasured collection of figurines. Branwen does not know what to do.
2. Harri has mild dementia. He is prone to wander and to be a bit disruptive. He lives with his son and daughter-in-law (Brian and Katy) with their three young children. He transferred the house to them some years ago on condition that he can continue to live there. Katy is finding it increasingly difficult to cope with Harri and the three children when Brian is out at work. In addition, they have been finding that their evenings are disrupted and that they have no quality time together. Brian claims that Harri's behaviour may frighten the children. Conscious of the undertaking to allow Harri to remain in the home, they devise a plan whereby they will section off part of the house as a private apartment for Harri. The apartment has a bedroom and sitting room along with a toilet. There is a locked door to the apartment and only Brian and Katy have access to the key. Harri spends most of his day locked in the apartment.
3. Ifan, who is 96 years of age, lives alone and is capable of looking after himself. His neighbour, Meirion, calls in every day. Meirion never knocks and sometimes walks in on Ifan when he is using the lavatory. In addition, Meirion speaks in a very loud voice, almost as if he is shouting at Ifan. He also fails to respect Ifan's personal space. Ifan does not like any of this. He does not think that Meirion intends any harm, but he finds it uncomfortable and on rare occasions feels a little intimidated.




# Conclusion

The purpose of this Guide is to help make practitioners aware of the legal context within which they work. It is not a substitute for obtaining legal advice nor is it a definitive statement of the law. Each case will depend upon its own facts and the law is often more complex than this Guide might suggest. An awareness of the framework of the law enables practitioners to consider the range of options available. However, it is essential to emphasise that the use of the law has significant limitations. Indeed, in some cases, it may be unnecessary or undesirable to use the law. On occasions, the use of the law may exacerbate the situation and further harm the older person.

Care must be taken and the use of any of the laws discussed in this Guide must be proportionate and the potential consequences of their use (good and bad) must be assessed. Nevertheless, in deciding how to use the safeguarding procedure legal options must be considered as older people are entitled to the protection of the law and must not be discriminated against. The role played by the law, and the potential for greater use of the law, are issues that should be considered in Serious Case Reviews and in lessons learned conferences. Was the law used appropriately? Would any of the legal processes outlined in this Guidance have made a difference and avoided a death or serious injury?

Of particular importance is the role the Human Rights Act 1998, which gives effect to the provisions of the European Convention on Human Rights by making them part of the law in Wales. The abuse of an older person is a violation of their human rights and all concerned must recognise it as such, including the suspected abuser. In addition, abuse will often amount to a criminal offence – a number of offences have been discussed in this Guide. The fact that a stranger does not commit the offence, but rather a trusted person, does not affect the criminal nature of the behaviour.




Using the law requires a high level of interagency working particularly in the collection and preservation of evidence. Lawyers should be involved if complex legal intervention is proposed. Of particular value is a close working relationship with the police as they have the expertise and the powers to assist the investigative process. The Crown Prosecution Service must also be part of the interagency approach, as it will make the ultimate decision whether a criminal prosecution should go ahead.

Sharing information between agencies is crucial; failure to share, or a highly selective sharing of information, is unacceptable. A common theme of child abuse inquiries is that the practitioners failed to share information. There is no reason to think that failure to share in cases of elder abuse does not have equally tragic consequences.

The law outlined in this Guide is not a law designed specifically to safeguard older people at risk of abuse. It is law that applies to all citizens and we are all entitled to benefit from it. Sadly, older people are sometimes denied the protection of the law. A decision not to take action (for example, prosecution) on the basis of ageist assumptions about the older person's ability to cope with or to participate in the process must be challenged. Sometimes misplaced and well-intentioned welfare-ism may effectively deny the older person the protection of the law. Each case must be decided on its individual facts and generalisations about older people avoided at all cost.

One bit of law that is missing is a law dealing specifically with safeguarding adults at risk. Scotland has such legislation - the Adult Support and Protection (Scotland) Act 2007. This Act imposes a duty on councils in Scotland to investigate a person's well-being, property or financial affairs if it knows, or believes, that the person is an adult at risk, and that it might need to intervene to protect their well-being, property or financial affairs.

The Act gives councils powers of entry and the ability to apply to the Sheriff's court for an assessment order, a banning order or a removal order. It seeks to balance the powers to intervene by requiring that any intervention will provide benefit to the adult that could not otherwise reasonably be provided.



As no such law exists in Wales, practitioners must work under the 'In Safe Hands' guidance issued under s.7 Local Authority Social Services Act 1970. Section 7 requires local authorities to act under this guidance. Many people have campaigned for the introduction of a law similar to that in Scotland in Wales and England. It is possible that Wales could introduce its own law on this subject, particularly now the National Assembly for Wales has acquired primary law making powers.

Elder abuse, like any other form of abuse, is totally unacceptable – it can never be justified. It is disturbing that there are thousands of older people from all lifestyles and parts of the country experiencing abuse by those in positions of trust. Some abuse is life threatening or risks serious harm. Other forms of abuse have less devastating consequences, but are also clear violations of the older person's dignity, are a violation of their human rights and reduce the quality of life of those who experience it. It is a sad reflection on the attitudes of some people in society towards older people.

Many things can be done to protect older people from abuse and enable them to live in dignity and safety. Early intervention and preventative work are essential. Much good work is undertaken in Wales. It is essential that awareness of elder abuse is raised and that society accepts its role in eradicating it. The law outlined in this Guide on its own will not end elder abuse. However it will, if used appropriately and sensitively, provide some protection for older people who are being abused when placed alongside the essential contribution of the range of practitioners and agencies engaged in safeguarding older people at risk of abuse in Wales. Of course, the challenge is to address the causes of elder abuse, thus enabling all older people to live without fear for their dignity, safety and security.

**John Williams, Professor of Law**  
**Department of Law and Criminology**  
**Aberystwyth University**




# Appendix 1:

## Case studies suggested answers

The case studies in this Guide are intended to identify key issues arising out of the discussion on the legal framework. Obviously, more evidence is required for a proper assessment of the scenarios. However, they do enable you to identify the headline issues. Below is a summary of some of the issues that arise in each of the studies. They are not answers, but merely prompts; they demonstrate the thought process that should be adopted by professionals.

### Chapter 2: Mental Capacity


1. The signing of the LPA is highly suspicious. Ming is clearly very vulnerable as she is in hospital and heavily sedated. The sedation may give rise to questions about her capacity at that time – note that her son visited her just after the accident. There is also the question of undue influence. Her son has completed the LPA form (it is not for him to complete –any lawyer asked to participate in these circumstances should have refused). He also makes threats about his willingness to care for her being dependent upon her signing the LPA. She does not receive independent legal advice. It would appear as though this is financial abuse. That conclusion is reaffirmed by the subsequent financial transactions and his intention to place her in a nursing home. Note also that the son has not seen Ming for ten years.
2. Have the doctors provided Gwyn with sufficient information in a form that is accessible to him? It seems highly unlikely that they have. They have failed to take account of his limitations in relation to reading and have not attempted to accommodate any special communication needs that he may have. They have rushed to a decision of incapacity based on his ability to answers some absurd questions that many people may have difficulty answering. Remember the strong legal presumption of capacity and the obligation to maximise the opportunity of people to decide for themselves.

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3. The decision on capacity confuses two things – the question of capacity and the living conditions of Catrin and Aled. The fact that they consciously choose to live in such conditions does not mean that they lack capacity. We may or may not agree with the way they live, but remember that they have the right to make decisions that others may regard as unwise or eccentric without the risk of being deemed to lack capacity. The risks involved in living the way they live is a separate issue and we cannot diagnose incapacity simply because we want to protect them from themselves.
  4. Malakai lacks capacity so how do we determine what is in his best interests? The Mental Capacity Act 2005 best interest checklist must be referred to (as must the legal principles found in the Act). Malakai's past and present wishes must be taken into consideration as well as his beliefs and values. The relatives should be consulted in order to build a picture of Malakai and what is in his best interest (note they are consulted on what is in his best interests rather than what they want to happen). The amount of weight given to their views depends upon a number of factors including how well they knew him. This is a very difficult decision for the doctors. Regard should be had to the arrival of the grandson.

## Chapter 3: Deprivation of Liberty

1. The fact that Dewi is not aware of what is happening does not mean that he can be deprived of his liberty. Although he appears well looked after, he is confined to his room and this is most probably a deprivation of liberty. He spends most of his day in the room – it would be necessary to discover how much time he spends out of the room. A significant period outside of his room may point more to restraint than deprivation; however, each case turns on its own facts and it is useful to remember what the European Court said in *Bournewood* – was he under continuous supervision and control and was he free to leave? Care homes have a duty of care towards residents, but this cannot be performed by unlawfully depriving the person of their liberty to make sure that they are 'safe'.



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2. Again Abigail's case demonstrates the need to take account of the duty of care, but also to recognised her right not be unlawfully deprived of her liberty. The evidence suggesting restraint rather than deprivation is that she wanders around the home, she goes to the local park, and she goes for walks in the garden. The evidence supporting an unlawful deprivation are the limited frequency of the above and the restraints that are imposed (not allowed to get off the bus, barring her from the day room). It is also relevant, and points towards a deprivation, that her sister's visits are restricted to two a year. More evidence is required, but it looks like a deprivation. What can be done to allow her more freedom within the home? More regular visits, greater access to fresh air, supervised walks in the park. Remember that even if a deprivation of liberty authorisation is granted, the objective is to remove the deprivation and enable people to enjoy as much freedom as possible.

## Chapter 4: Confidentiality and data protection


1. Jac has no right to keep the information between him and Gwenda secret. The safeguarding procedures require that any suspicions of abuse be reported. Practitioners cannot give undertakings that information will 'go no further'. The case study demonstrates the importance of Gwenda knowing this ahead of time – she can then decide if she wishes to share the information and knows the consequences of sharing. In effect, she can make an informed decision.
2. Professionals must share information. Editing it based on what you think other professionals 'need to know' is dangerous. Important points can be missed and you fail to get the overall view of the case.
3. The data protection principles require that measures should be taken to protect information from unauthorised or unlawful processing of personal data. Password protected computers and other security measures are essential.
4. Under the data protection principles, data must be accurate and up to date. Addresses must be correct and the outcome of any investigation recorded, otherwise the data is misleading and inaccurate.

## Chapter 5: The Criminal Justice System

1. This is unacceptable and denies Dafydd the right to have his property protected by the criminal law. Dafydd cannot be forced to adopt the idea of sharing all his possessions. Care homes must do all that is reasonable to protect the personal property of residents.
2. Martyn is obviously obtaining Dewi's iPod unlawfully. He is using threats and abusing his position of trust to obtain the iPod. The fact that Martyn may consider it some kind of 'swap' is irrelevant in these circumstances.
3. For a number of reasons this scenario gives rise to concerns. What kind of pressure or maybe even force (psychological, physical) might Mari be using? How has Mari suddenly come into enough money to buy the new car? What caused Jenny to change the bank account and her will? There is some suspicious activity in this case that make it worthy of investigation to see if any financial or other abuse is occurring.

## Chapter 6: Powers of arrest and entry

1. The social worker in this case has no freestanding right to enter the property, despite her concerns about Steffan. It would be appropriate to ask the police to intervene using their power under s.17(1)(e) PACE 1984 – this allows a police officer to enter and search premises for the purpose of saving life or limb. As there is an immediate need to intervene, this power is useful and can be exercised without the need for prior authorisation by the magistrates.
2. The AMHP has a power to enter property in which a 'mentally disordered' patient is living if they have reasonable cause to believe that they are not under proper care. There is no power to force an entry, however, anybody obstructing the AMHP may be guilty of an offence under s.129 of the MHA 1983. In such circumstances, a warrant under s.135 may be obtained.

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3. In the past the use of s.47 National Assistance Act 1948 might have been contemplated. However, it is highly unlikely that it would be used today. Other environmental/public health legislation may be considered, particularly as Jane's behaviour is having an impact on her neighbours. Jane has the right to live as she wants, however her neighbours also have rights. Any intervention would be based on environmental/public health principles rather than a wish to impose a changed life style on her. However, an assessment would be beneficial if she is prepared to accept intervention by social services.

## Chapter 7: The use of Private Law

1. Branwen, in addition to the criminal law possibilities, may think about seeking a non-molestation order under the Family Law Act 1996. The conduct is molestation as it puts her in fear for her own safety. Glyn is her nephew so comes within the definition of 'associated person'. Glyn might also have committed an assault by putting Branwen in fear of an immediate battery. In addition, the Protection from Harassment 1997 provides a private law remedy for harassment. As well as damages (which may not be what she wants), she could get an injunction to restrain Glyn from harassing her. Note also the criminal provisions in the Protection from Harassment Act 1997.
2. This may amount to false imprisonment. As with deprivation of liberty (with which there are obviously many similarities), the person need not be aware that they are being imprisoned. Using the common sense test, is Harri imprisoned?
3. This could potentially be harassment by Meirion, although it seems that he is unaware of the consequences of his action. Informing him of the impact of his behaviour will put him on notice and persuade him to amend his behaviour.



# Appendix 2:

## The United Nations Principles for Older Persons

### Independence:

1. Older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help.
2. Older persons should have the opportunity to work or to have access to other income-generating opportunities.
3. Older persons should be able to participate in determining when and at what pace withdrawal from the labour force takes place.
4. Older persons should have access to appropriate educational and training programmes.
5. Older persons should be able to live in environments that are safe and adaptable to personal preferences and changing capacities.
6. Older persons should be able to reside at home for as long as possible.

### Participation:

7. Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations.
8. Older persons should be able to seek and develop opportunities for service to the community and to serve as volunteers in positions appropriate to their interests and capabilities.
9. Older persons should be able to form movements or associations of older persons.



## Care:

10. Older persons should benefit from family and community care and protection in accordance with each society's system of cultural values.
11. Older persons should have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness.
12. Older persons should have access to social and legal services to enhance their autonomy, protection and care.
13. Older persons should be able to utilize appropriate levels of institutional care providing protection, rehabilitation and social and mental stimulation in a humane and secure environment.
14. Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.

## Self-fulfilment:

15. Older persons should be able to pursue opportunities for the full development of their potential.
16. Older persons should have access to the educational, cultural, spiritual and recreational resources of society.

## Dignity:

17. Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.
18. Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.

# Appendix 3:

## The Care and Social Services Inspectorate for Wales



Arolygiaeth Gofal a Gwasanaethau Cymdeithasol Cymru  
Care and Social Services Inspectorate Wales


### Legal Framework

The Health and Social Care (Community Health and Standards) Act 2003 provides the statutory basis for the powers and duties of CSSIW which it discharges on behalf of the Welsh Ministers in relation to the inspection and review of local authority social services. The Welsh Ministers have the power to carry out an inspection of any local authority social services in Wales. They also have powers which have been delegated to CSSIW to undertake reviews into the economy, efficiency and management of local authorities in Wales individually and collectively. It must co-operate with the Wales Audit Office in exercising the review powers.

The functions of the Welsh Ministers relevant to care and social services have their main source in the Care Standards Act 2000, The Children Act 1989 (as amended), the Adoption and Children Act 2002 and NHS and Community Care Act 1990.

### Independence and status

CSSIW carries out its functions on behalf of Welsh Ministers. It is part of the Public Services and Local Government Delivery Directorate within the Welsh Assembly Government and there are a number of safeguards in place to ensure its independence.



The Inspectorate is functionally independent of Welsh Assembly Government and has extensive operational autonomy. This includes setting its programme of work which does not require Ministerial agreement or approval, full editorial control over reports and their publication and access to independent experts for advice.

## Financial independence

CSSIW has a separate annual budget which is set by Welsh Assembly Government.

## Vision and values

CSSIW has set out its vision and values, placing service users' experiences at the heart of our work. We are committed to improving care for people who use services, their families and carers, for people who need services and the citizens of Wales.

Our priorities are:

- engaging service users and stakeholders, seeking their views;
- contributing to services and care that meet peoples' needs;
- championing good quality services and practices;
- acting swiftly to tackle poor quality services and care;
- demonstrating professional knowledge and independent work;
- showing consistency and fairness in our work.

## Inspections and reviews of services for adults

- All Welsh local authority social services
- Care homes for adults – including care homes which provide nursing care
- Domiciliary care agencies
- Adult placement schemes
- Nurses' agencies





## Frequency of inspections

The inspectorate assesses Local Authority Social Services annually. The frequency and intensity of inspections of services regulated under the Care Standards Act 2000 varies according to the type of service, regulations, guidance and assessment of information about the service.

## Types of inspections

CSSIW undertakes announced and unannounced inspections.

## Private interviews

CSSIW has powers to interview in private:

- (i) any person carrying on, managing or working at premises in respect of services registerable under the Care Standards Act 2000 or Children Act 1989; or
- (ii) any person accommodated or cared for there who consents to be interviewed.

CSSIW has similar powers under the The Health and Social Care (Community Health and Standards) Act 2003 in relation to persons working or accommodated on premises owned or controlled by a local authority or used in connection with a local authority social service.

## Access to information

CSSIW has rights of entry to premises, rights to inspect and remove documents and to require information under the aforementioned legislation.

## Recommendations and suggestions for amendments to legislation

CSSIW encourages the improvement of social care, early years and social services by providing professional advice to Ministers and policy makers. CSSIW acts to inform policy direction and development across a wide area of services, including new legislation, policy and practice guidance.



## Annual Report

The Chief Inspector publishes an annual report of CSSIW's work which is presented to Ministers and which is subject to scrutiny by the Welsh Assembly plenary and committees.

## Publication of findings after inspections

CSSIW publishes reports on the findings of its inspections and reviews. These are available on the website or from regional offices.

## Expertise

Staff have a wide range of qualifications and experience in health and social care and the management and performance of public services.

## Appointment

The Chief Inspector is a senior civil servant and all staff in CSSIW are civil servants.

## Proactive and reactive mandate

The Health and Social Care (Community Health and Standards) Act 2003

CSSIW carries out reviews and inspections of local authority social services in accordance with its statutory functions.

Care Standards Act 2000

Registration – CSSIW determines applications for registration for providing a services regulated under the Care Standards Act 2000;

Inspection – CSSIW inspects services regulated under the Care Standards Act 2000;

Complaints – CSSIW investigates complaints about social care services in accordance with its statutory responsibilities and regulatory functions



Compliance – we seek compliance with the regulations; and

Enforcement – we take enforcement action to make sure that the requirements of the relevant primary legislation and associated regulations are met.

## Legal standards applied

CSSIW carries out its functions and inspects services in accordance with relevant legislation, regulations, guidance and standards as these relate to social services and social care services.

## Co-ordination of visits

CSSIW inspects agencies and services in collaboration with other inspectorates and audit bodies, including the Wales Audit Office, Estyn, Health Inspectorate Wales, HM Inspectorate of Probation, HM Inspectorate of Constabulary and Ofsted.

## Preventive Activities

Under the Health and Social Care (Community Health and Standards) Act 2003 CSSIW has a general duty of encouraging improvement in the provision of Welsh local authority social services, it does this through review and inspection of services, publishing reports of its work and providing advice to Welsh Ministers. Social care services which fall within the scope of the Care Standards Act 2000, are required to register with CSSIW before they can provide a service. To do this they must demonstrate that they meet all the requirements set out in legislation and guidance. CSSIW also has powers to require improvements in registered services and to take enforcement action which can lead to prosecution of individuals and closure of services which do not meet the required standards.

# Appendix 4: The Vetting and Barring Scheme and the Independent Safeguarding Authority



Independent Safeguarding Authority

## Review of the Vetting and Barring Scheme

The government has completed a review of the scheme to scale it back to 'common sense' levels. The results of the review were announced in February 2011. Changes to the scheme are included in the Protection of Freedoms Bill 2011. Accordingly, the following information only relates to the current operation of the scheme.

## Background

The Vetting and Barring Scheme is an outcome of the Richard Inquiry into the Soham murders. The tragic events in Soham focussed attention on the way in which people who work with children are vetted. The Richard Inquiry recommended a new scheme that would ensure that everyone working in regulated activity with children (defined as those under 18) or vulnerable adults is checked, registered and monitored.

## The scheme and vulnerable adults

The scheme will strengthen safeguarding of vulnerable adults by helping to reduce the opportunities of those who pose a risk of harm to them having access to them through work or volunteering.



## Independent Safeguarding Authority

The Independent Safeguarding Authority (ISA) is a Non Departmental Public Body set up in 2008 under the Safeguarding Vulnerable Groups Act (2006). In partnership with the Criminal Records Bureau (CRB) and Access Northern Ireland (ANI), it is helping to deliver the Vetting and Barring Scheme (VBS).

## Under the VBS

- The ISA is responsible for making the difficult and often complex independent decisions about whether to bar people (or not) from working with vulnerable adults because they pose a risk of harm. Those decisions were previously made by Government ministers / officials. The ISA Board is made up of experienced professionals who bring expertise in safeguarding and governance. They are corporately responsible for the decisions of the ISA.
- The ISA's decision-making process includes a risk assessment process developed by the ISA Board and publicly available.
- The ISA maintains the Children's Barred List and the Adults' Barred List. People may be placed on one or both of the lists.


## What is happening now?

Since October 2009 employers have had a legal duty to refer information to the ISA if an employee has harmed a vulnerable adult or if there is a risk of harm and the person has been permanently removed from working with the vulnerable.

As well as considering referrals of this kind, the ISA is also required by law to bar those people who have been convicted of 'autobar' offences (the most serious sexual / violent offences). Some autobar offences are such that the person can make representations as to why they should not be barred – others do not allow for representations to be made.

## Benefits of the ISA

- The previous six barred lists (including POCA, POVA & List 99) formally in operation in England, Wales and Northern Ireland have been consolidated into the two new barred lists (for children and vulnerable adults).
- Barring decisions are now made by the ISA Board and trained, accredited ISA caseworkers.
- The ISA's Decision-Making process provides a consistent and robust process to determine whether a person should be barred from working with either (or both) children and vulnerable adults. The decision making process and caseworker guidance notes are published on the ISA website.
- The law requires the ISA to ensure fairness and transparency in its decision-making by sharing all the information it relies on with the person, so that they can make 'representations' (within 8 weeks) as to why they believe a bar is inappropriate. There are no secrets in the decision making process and the person will always (except in the most serious autobar cases) be able to argue why they should not be barred.
- The 'representations process' also enables those with previous convictions or cautions to demonstrate how they have rehabilitated and therefore why a bar is not appropriate.
- The ISA has identified those offences considered relevant to barring and will publish them on the ISA website.
- The ISA shares safeguarding information with regulators such as the General Teaching Council and the General Medical Council and inspectorates such as Ofsted and the Care Quality Commission.

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- Employers, children's and adults' services and regulators have a legal duty to refer information to the ISA on people who pose a safeguarding risk to children or vulnerable adults. This ensures that the ISA has the relevant information it needs to make barring decisions and for example prevent a person moving to another job in perhaps another geographical area to escape detection.

ISA website      [www.isa.homeoffice.gov.uk](http://www.isa.homeoffice.gov.uk)

CRB website      [www.crb.homeoffice.gov.uk](http://www.crb.homeoffice.gov.uk)





# Appendix 5:

## The Legal Services Commission

### legal services



COMMISSION

The Legal Services Commission (LSC) manages the legal aid budget in England and Wales. The LSC funds solicitors and advice agencies to enable people on benefits and low incomes to get help with their legal problems. People can get face-to face advice, as well as advice over the telephone.

### Can I get legal aid?

If you need help with the costs of legal advice, you can apply for legal aid through your solicitor or advice agency. Whether you get it will depend on:

- The type of legal problem you have
- Your disposable income and how much disposable capital (money, property, belongings) you have, and
- Whether there is a reasonable chance of winning your case and whether it is worth the time and money needed to win.

A person may be asked to pay some of the costs of their case. This is means-tested. If a person wins money or property in a civil case, they may be asked to repay some of their legal costs.

### Contact details for LSC office in Wales

Legal Services Commission  
Marland House, Central Square  
Cardiff CF10 1PF  
Tel: 0300 200 2020

[http://www.legalservices.gov.uk/aboutus/our\\_regional\\_network/wales.asp](http://www.legalservices.gov.uk/aboutus/our_regional_network/wales.asp)

## Would you like to speak to us in Welsh?

We have a dedicated telephone line for Welsh callers: Tel: 0845 609 9989

**Community Legal Advice** provides a free and confidential telephone advice service paid for by legal aid (for those who qualify). Call for free advice on **0845 345 4 345**. Calls cost no more than 4p per minute from a BT landline. Calls from mobiles are usually more. Call from 9am to 8pm Monday to Friday and between 9am and 12.30pm on Saturday. You can get free independent advice about

- Benefits and tax credits
- Debt
- Housing
- Family
- Employment
- Education

A green speech bubble with a dark blue outline containing the text "community legal advice" in white lowercase letters.


community  
legal advice

## What will happen when I call?

The first person you will speak to is an operator. They will ask you questions about your problem to find out what kind of information and advice you need.

**If you have a problem we can help with**, the operator will ask you some more questions about your finances to see if you are eligible for free specialist advice.

- **If you are eligible and want advice over the phone** you will be connected to a specialist legal adviser immediately. The specialist legal adviser will then take on your case. They will write letters on your behalf and speak to people like landlords and creditors for you. They can even prepare bundles of documents for you to take to an employment tribunal.
- **You can speak to your adviser**, in confidence, as many times as you need to, until your problem is solved.

- 
- **Even if we can't help**, we can put you in touch with other services that can.
  - **We never charge for our services.** All our advice and help is funded by legal aid.

## Can I get advice in other languages?

The helpline has a free translation service if you would like advice in a language other than English or Welsh. Language Line provides an instant translation service in 170 languages.

## Can I use Minicom or Typetalk?

- **Minicom** is a telephone typewriter device for communication with or between deaf, hard-of-hearing, or speech-impaired people. The Minicom number is 0845 609 6677.
- **Typetalk** enables those who have hearing difficulties to use a text phone to access telephone advice through a free operator service.

## Worried about how much the call will cost?

If you are worried about the cost, you can ask an adviser to call you back, or get us to call you by:

- Using our simple webform on the website below – we'll call you back at a time that suits you.
- Texting 'legal aid' then your name to 80010 and we'll call you back within 24 hours. The cost of your text will be at the standard rate for your operator.

Community Legal Advice has lots of information on common legal problems. Find this at [www.communitylegaladvice.org.uk](http://www.communitylegaladvice.org.uk)


On the website you can also use the legal aid calculator to find out if you are eligible for free advice or find a local solicitor or advice service near to you.



# Appendix 6

## Other useful web addresses

- Healthcare Inspectorate Wales  
<http://www.hiw.org.uk/>
- SSIA Cymru  
<http://www.ssiacymru.org.uk/index.cfm?articleid=2&splashpage=false>
- Welsh Ambulance Service NHS Trust  
<http://www.ambulance.wales.nhs.uk/>



This guidance is issued in accordance with the Commissioner's general function of keeping under review the adequacy and effectiveness of law affecting the interests of older people in Wales [Commissioner for Older People (Wales) Act 2006, s. 2(1)(d)].

## Accessible formats

If you would like a copy of this document in large print, please contact the Older People's Commissioner for Wales.

## Older People's Commissioner for Wales

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Mount Stuart Square  
Cardiff CF10 5FL

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